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Targeting War-Sustaining Capability at Sea: Compatibility with Additional Protocol I

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Twenty-First Century Embedded Journalists: Lawful Targets?

Major Douglas W. Moore*

I. Introduction

It is now 2012 and an international armed conflict exists between Iran and Iraq. Since U.S. military forces withdrew from Iraq in early 2011, Iranian sentiment has grown increasingly hostile towards Iraq for its rejection of radical Shiite influences in the new Iraqi government. Various international intelligence sources indicate that Iran initiated a coordinated missile attack on several Iraqi towns. Nevertheless, Iran's Military Information Minister emphatically states that Iraq initiated the first strike. The security of the greater Middle East hangs in the balance.

As a result of this crisis, the United Nations Security Council (UNSC) passes a UNSC resolution authorizing member states to form a multinational force under a unified command to take "all necessary means" to restore international peace and security in the Middle East.¹ The United States will spearhead a multinational force with the intent to conduct a ground war in Iran. The UNSC is concerned with the ground invasion being perceived as a "war on Islam," resulting in a greater Middle East regional war. Additionally, the United States is concerned with maintaining public support for the conflict due to national exhaustion from the previous wars in Iraq and Afghanistan.

In advance of military intervention, the Secretary of Defense (SECDEF) calls a Pentagon press conference to announce the general framework for the media's involvement in the military operations. A Department of Defense (DoD) spokesperson communicates that the ultimate strategic success of this campaign is based upon winning the information war through the extensive use of media coverage. Specifically, the Joint Force Commanders (JFC) and the Public Affairs Officers (PAO) have been told to "accommodate the media whenever possible" by (1) "disseminat[ing] accurate and timely information" to inform the public and grow coalition support and (2) to "counter adversary propaganda and erroneous information in the adversary's press."² The aggressive use of military and civilian media assets are designed to garner public support for the conflict and attack Iran's current misinformation campaign so other Shiite radical groups will be deterred from joining the cause. In addition, undermining Iran's propaganda campaign will have the intended effect of creating dissent within the enemy's ranks, and accelerating their capitulation.

Aside from the Coalition's strategic objectives for the use of the media, the Pentagon also unveils the smaller scale details of how journalists will be involved on the battlefield. The Pentagon plans to invite hundreds of well-seasoned war correspondents to embed in frontline units for the duration of combat operations. Initially, the U.S. military will host two-week "boot camp" sessions for journalists bound for combat. The instruction, provided by U.S. Army drill sergeants at U.S. military facilities, will primarily focus on the safety of journalists. However, journalists will also be taught the basics of providing first aid to combatants, land navigation, familiarization with military equipment and weapon systems as well as techniques designed to safeguard tactical information in combat. After completion of the course, journalists will be accredited and assigned to combat units. Each war correspondent will then be issued an identity card to comply with Geneva Conventions protocol, providing notice of their civilian status, yet giving them special protections as prisoners of war (POW) in the event of enemy capture.³

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¹ Chapter VII of the UN Charter, entitled "Action With Respect to Threats to Peace, Breaches of the Peace, and Acts of Aggression," provides the UNSC authority to determine what measures should be employed to address acts of aggression or other threats to international peace and security. U.N. Charter art. 42. Under Chapter VII, Article 42 allows the use of military force should non-military means in resolving a conflict prove to be inadequate. *Id.* The UNSC communicates the authority to use military measures with the language "all necessary means." *Id.*

² JOINT CHIEFS OF STAFF, JOINT PUB. 3-61, PUBLIC AFFAIRS, at I-2 (9 May 2005) [hereinafter JOINT PUB. 3-61] (citing primary reasons why JFCs and PAOs will allow media to report on military operations); *see also* JOINT CHIEFS OF STAFF, JOINT PUB. 3-13, INFORMATION OPERATIONS, at x (13 Feb. 2006) [hereinafter JOINT PUB. 3-13] (discussing that public affairs is a core capability of the greater military information operations mission).

³ Geneva Convention Relative to the Treatment of Prisoners of War art. 4A(4), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950) [hereinafter GC III].

In theater, war correspondents will have unprecedented access to the battle space—from the unit planning cells at the tactical operations center (TOC) to the infantry patrolling cities and engaging the enemy in firefights. Journalists will be exposed to the same personal risks as the ground forces and experience daily life from the perspective of the servicemembers. Except for the issuance of a weapon, they will be permitted to wear military uniforms in combat and will be issued helmets and ballistic vests for protection. On the battlefield, journalists will travel by military transportation and use military communication technology to get their stories to the press. Their work product may be censored by the unit to ensure operational security. This same censorship will also be applied to military journalists who will work and live along side war correspondents covering the same events. Both military and non-military journalists will come under the command and control of the unit PAO for the duration of their embedding.

In response to the DoD’s media policy for combat operations, Iran has declared that the Coalition’s use of embedded journalists violates Article 79, Protocol I to the Geneva Conventions.⁴ Consequently, Iran warns that it has the right to lawfully target embedded journalists as they are not being used in their professional capacity, but instead as an extension of military operations.

Though hypothetical, this scenario illustrates how the conduct and use of war correspondents on the modern battlefield threatens their special protective status under international law. There is no doubt that the current conflicts in Iraq and Afghanistan have forced the U.S. military to make fundamental changes in the way it conducts warfare.⁵ The United States has increasingly relied upon non-military members such as DoD civilian employees, government contractors, and non-affiliated civilians⁶ to “accomplish tasks directly affecting the tactical success of an engagement.”⁷ As a result of these recent changes, the role of journalists has become increasingly important to military wartime objectives.⁸ Today’s prevalent practice of embedding journalists in tactical units has established an unprecedented level of military-press relations and raises a troubling and unanswered question: does the U.S. embedded journalist program strip war correspondents of their historical protections under the laws of war and make them lawful targets?

The answer depends upon whether journalists perform activities outside the scope of their “professional mission” permitted by Article 79 of Protocol I during the course of an armed conflict.⁹ Journalists who perform activities that are in direct support of combat operations can be viewed as taking “a direct part in hostilities” under the United States’ view of

⁴ Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 79, June 8, 1977, 1125 U.N.T.S. 3 (entered into force Dec. 7, 1978) [hereinafter Protocol I]. While the United States is not a ratifying party to Protocol I, it recognizes the legal effect of these provisions as being customary international law which is equally as binding on States in conducting themselves in accordance with the laws of war. *See The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U.J. INT’L L. & POL’Y 416, 419–420 (1987) [hereinafter U.S. State Dep’t Remarks] (transcript of remarks made by Michael Matheson, U.S. Dep’t of State Deputy Legal Advisor). Customary international law results from the general and consistent practice of States followed from a sense of legal obligation. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27). Customary international law does not require full acceptance by all States to be binding, but the more States following the particular practice, the more likely it is to be binding on all States, unless one State persistently objects. *Id.*

⁵ The Department of Defense (DoD) Quadrennial Defense Review Report (QDR) asserts that DoD must “aggressively” pursue the transfer of those functions which are “indirectly or not linked to warfighting” to the public sector. U.S. DEP’T OF DEFENSE, QUADRENNIAL DEFENSE REV. REP. 53–54 (Sept. 30, 2001) [hereinafter 2001 QDR]. The QDR calls for the DoD to more clearly identify “core” DoD functions and asserts that a “major change in the culture of the Department” is necessary to end the performance of many non-core functions by uniformed servicemembers. *Id.* It states, “any function that can be provided by the private sector is not a core government function.” *Id.*

⁶ Unless noted, a person not a member of a uniformed armed force, also called a non-military member, is assumed to be a civilian for the purpose of this article. International law defines “civilians” in a variety of places, but just as often uses the term without definition or by exception. *See, e.g.*, Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 4, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950) [hereinafter GC IV]. Geneva Convention IV defines and discusses “protected persons” rather than “civilians” and does so by exclusion rather than inclusion. *Id.* Geneva Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (entered into force Oct. 21, 1950) [hereinafter GC II] discusses “persons who accompany the armed forces without actually being members thereof” in art. 13(5). It uses the term “civilian population” without a definition. *Id.; see, e.g.*, Protocol I, *supra* note 4, arts. 43, 50 (defining “armed forces” in Article 43 and defining “civilian” by exception in Article 50). Persons who accompany the armed forces without being members thereof, such as civilian employees and most contractors, are civilians under the definition by exception since they are identified in Article 4A(4). GC III, *supra* note 3, art. 4A(4); *see generally* W. Hays Parks, *Air War and the Law of War*, 32 A.F. L. REV. 1, 75, 113 (1990) (discussing the legislative history of the definition of civilians).

⁷ Colonel Steven J. Zamparelli, *Competitive Sourcing and Privatization: Contractors on the Battlefield, What Have We Signed Up For?*, A.F.J. LOG. 9, 10 (Fall 1999) (discussing the level of involvement non-military members have in today’s military operations). *See generally* Major Lisa L. Turner & Major Lynn G. Norton, *Civilians at the Tip of the Spear*, 51 A.F. L. REV. 1 (2001) (defining the types of civilians who accompany the force and the roles they play in today’s military operations).

⁸ JOINT PUB. 3-61, *supra* note 2 (providing strategies for the use of the media in military operations).

⁹ Protocol I, *supra* note 4, art. 79.

Article 51(3) of Protocol I.¹⁰ Consequently, when embedded journalists are used as mere extensions of the military's information operations, the inappropriate use of their professional activities subjects them to a potential loss of protections and makes them a lawful target.

In order to support this contention, this paper is divided into three sections. Section II brings historical context to the use of journalism in armed conflicts in order to provide a framework for the evolution of military-press relations, which has culminated in the use of embedded journalism. Section III establishes the legal axis for conducting combat journalism under the laws of war, to specifically include the legal status and protections afforded journalists in international armed conflicts. The discussion will then turn on the interplay between what it means for a journalist to be "engaged in dangerous professional activities" and what types of circumstances could adversely affect their status as civilians under differing theories of Article 51(3)'s practical application.¹¹ Section IV provides recommended criteria to help determine what types of circumstances create a loss of Article 79 protections for embedded journalists. This section concludes that the U.S. use of embedded journalists has stripped war correspondents of their special civilian protective status when they are not "engaged in dangerous professional missions,"¹² and instead, embedded journalists are being used as instruments of warfare for the greater military mission.

II. Historical Framework for Embedded Journalism

The Pentagon officer who conceived and advanced the embedded journalist program should step forward and demand a fourth star for his epaulets. By prepping reporters in boot camps and then throwing them in harm's way with the invading force, the U.S. military has generated a bounty of positive coverage of the Iraq invasion, one that decades of spinning, bobbing, and weaving at rear-echelon briefings could never achieve.¹³

The use of embedded journalism is inextricably linked to the war correspondent whose origins have been deeply rooted in military operations since the birth of journalism itself.¹⁴ Understanding the role of today's war correspondent requires a historical perspective of their relationship with the military, their evolving roles, and the access and security strategies that they confront on the battlefield.¹⁵ These concepts create the historical framework for the use of embedded journalism in today's combat operations.

A. Military-Press Relations

The first essential in military operations is that no information of value shall be given to the enemy. The first essential in newspaper work and broadcasting is wide-open publicity. It is your job and mine to try to reconcile those sometimes diverse considerations.¹⁶

Ever since war correspondents took to the battlefield, a struggle has existed between their aim to broadcast the full story to the public and the military's goal to preserve the mission's operational security.¹⁷ According to the RAND Corporation, a

¹⁰ *Id.* art. 51(3).

¹¹ Article 79 establishes the primary measures of protections specifically accorded journalists. *Id.* art. 79(1), (2).

¹² *Id.* art. 79(1).

¹³ Jack Shafer, *The PR War*, SLATE, Mar. 25, 2003, available at <http://www.slate.com/id/2080699/>.

¹⁴ Prior to the Mexican War, military commanders directly reported the events of battle in the form of longer written works, and resented the idea of civilian influence. *See generally* MITCHEL P. ROTH, HISTORICAL DICTIONARY OF WAR JOURNALISM preface (1997). Thucydides provided personal written accounts of the Peloponnesian War while serving as a military officer in command of the Greek fleet at Thasos (424 B.C.) where the Spartans met defeat. *Id.* As commanding general, Julius Ceasar reported about the invasion of Britain in 55 B.C. *Id.*

¹⁵ *See generally* CHRISTOPHER PAUL & JAMES J. KIM, REPORTERS ON THE BATTLEFIELD: THE EMBEDDED PRESS SYSTEM IN HISTORICAL CONTEXT (2004). *Reporters on the Battlefield* is the first comprehensive work that has attempted to systematically evaluate and understand the embedded press system based upon multiple research studies linked with historical analysis. ROTH, *supra* note 14, at preface.

¹⁶ OFFICE OF THE SEC'Y OF DEFENSE, WASHINGTON D.C., FINAL REP. TO CONGRESS, CONDUCT OF THE PERSIAN GULF WAR 651 (Apr. 1992) [hereinafter PERSIAN GULF WAR REPORT] (quoting Dwight D. Eisenhower, 1944), available at <http://www.ndu.edu/library/epubs/cpgw.pdf>; *see also* PAUL & KIM, *supra* note 15, at 1. General Eisenhower's success in dealing with the competing goals of the military and media is evident by the well documented media reports forever encapsulated in a monument dedicated to him by war correspondents who reported the Normandy invasion events of 6 June 1944.

non-profit research organization in cooperation with the DoD, the mission, organizational attributes and goals of each institution are key components in understanding this relationship.¹⁸ These components are also helpful in qualitatively evaluating the potential for future conflict or cooperation between these institutions.¹⁹ However, analyzing these components has no context without a thorough reading of history.²⁰ Today's embedded journalist is a product of the military-press relations created from a common history of conflict and cooperation.

B. Development of War Reporting

Aside from the ideological underpinnings of military-press relations, the development of war reporting has largely evolved due to changes in technology, public culture, and tactical considerations on the battlefield. The years between 1840 and 1945 represent the conceptual stages of organized journalism on the battlefield. The idea of an embedded journalist was wholly undeveloped and largely unregulated by the media and military. However, during the post-World War II era, more formal mechanisms for defining the war correspondent's role on the battlefield emerged from a variety of global conflicts. At the dawn of the twenty-first century, embedded journalism was born. Today, the use of the embedded journalist has been widely heralded as the future in combat reporting.²¹

1. The Early Modern War Correspondent

The modern professional war correspondent, that unarmed civilian who reported the war from the trenches on behalf of a press agency, did not officially arrive on the journalistic landscape until the 1840s.²² Closely preceding the Mexican-American War (1846–1848), the invention of the telegraph, the penny printing press, and the rise in literacy helped to usher in the public's perennial appetite for war news.²³ For the first time, short, descriptive stories became common because events could be reported as they occurred.²⁴ These technological advances, coupled with the lack of government censorship,²⁵ fueled the public's demand for increased media coverage and the need for independent war correspondents.²⁶

Ideologically, the real explosion of professional combat media coverage came during the U.S. Civil War (1861–1865), when correspondents were dispatched to the field on a larger scale to garner public support for the varying causes.²⁷

¹⁷ Numerous scholars begin their discourse on press-military relations from the idea that both institutions are inherently different in their nature and goals. See, e.g., Michael D. Steger, *Slicing the Gordian Knot*, 287 U.S.F.L. REV. 957, 957–1007 (1994); Douglas Porch, *No Bad Stories*, 55 NAVAL WAR C. REV. 85 (2002); Neil Hickey, *Access Denied: Pentagon's War Reporting Rules Are Toughest Ever*, 40 COLUM. JOURNALISM REV. 26–31 (2002). Dr. Douglas Porch is a specialist in military history and professor of national security at the Naval Postgraduate School in Monterey, California.

¹⁸ PAUL & KIM, *supra* note 15, at 7–34; *see infra*, App. A.

¹⁹ PAUL & KIM, *supra* note 15, at 35.

²⁰ *Id.* at preface.

²¹ Embedded journalism is the most preferred method of reporting on combat operations according to media research and top U.S. military leadership. *Id.* at xiii (quoting comments from multiple prominent war correspondents, *Assessing Media Coverage of the War in Iraq: Press Reports, Pentagon Rules, and Lessons for the Future*, A Brookings Iraq Series Briefing, Falk Auditorium, Washington, D.C. (June 17, 2003)); *see also* Interview by Tony Snow, *Fox News Sunday*, with General Tommy Franks, CENTCOM Commander, U.S. Army (Apr. 13, 2003) (transcript available at http://www.foxnews.com/prINTER_FRIENDLY_story/0,3566,84055,00.html). General Tommy Franks is a major supporter of the embedded journalism system. *Id.*

²² William "Billy" Howard Russel of *The Times* of London, Edwin Lawrence Godkin of the *London Daily News*, and G.L. Gruneisen of the *Morning Post*, who reported during the Crimean War (1853–1855), are considered by historians to be the first modern independent war correspondents. *See PHILLIP KNIGHTLEY, THE FIRST CASUALTY: THE WAR CORRESPONDENT AS HERO AND MYTH-MAKER FROM THE CRIMEA TO KOSOVO* (2nd ed. 2000); ROTH, *supra* note 14, at preface.

²³ ROTH, *supra* note 14, at preface. On 24 May 1844, Samuel B. Morse electronically transmitted the first message via a telegraph from railway station in Baltimore, Maryland to the U.S. Supreme Court chamber in Washington, D.C. *See generally* The Samuel F. B. Morse Papers at the Library of Congress, 1793–1919, <http://lcweb2.loc.gov/ammem/sfbmhtml/sfbmhome.html> (last visited July 15, 2009).

²⁴ ROTH, *supra* note 14, at preface.

²⁵ Correspondents and sketch artists were allowed to provide both written and visual depictions of battles from the front lines without any government interference. STEPHEN L. VAUGHN, *ENCYCLOPEDIA OF AMERICAN JOURNALISM* 84 (2007).

²⁶ The Mexican-American War (1846–1848) also represents the first time U.S. reporters covered a foreign war. ROTH, *supra* note 14, at preface.

²⁷ During the U.S. Civil War (1861–1865), the Confederates relied heavily on telegrams and letters from servicemen to get their news, while at least 500 journalists covered the war for the Union in various capacities. *Id.* at 4. European press, particularly from Great Britain, tended to favor the Confederacy. *Id.* In fact, William Howard Russell, the British war correspondent of Boer War fame, was derided as "Bull Run Russell" for his criticism of the Union

However, unlike the Mexican-American War, media coverage was subject to “haphazard and arbitrary censorship” by a variety of techniques that “frequently depended upon the attitudes of individual generals and other officials” and less on issues of operational security.²⁸ Despite these imposed limitations, war correspondents played a significant role in thoroughly documenting the conflict.²⁹

Reporters in the Indian Wars (1860–1890) were less censored than journalists in the Civil War, but the inaccessibility of technology in the remote prairie areas acted as a natural barrier to getting stories to press.³⁰ More important than the actual reporting though, was the change of the war correspondent’s role on the battlefield. Journalists were frequently required to become combatants and often participated in the full range of daily hardships experienced by Soldiers.³¹

During World War I (1914–1918), independent war correspondence regressed due to harsh censorship controls of American journalists at the federal, state, and local levels.³² In one case, then-Major Douglas MacArthur, head of the War Department’s Bureau of Information, declared that the press should be subservient to the needs of the military in wartime.³³ These ideals culminated into the first known “mediated war.”³⁴ Governments controlled war correspondent reporting to gain support from their constituencies and to persuade their opponents.³⁵ This notion was exemplified in the creation of the first U.S. established “propaganda agency” which promoted pro-war materials to various media outlets.³⁶ At the ground level, war correspondents could not be accredited by the American Expeditionary Force unless they swore an allegiance to the United States.³⁷ This policy made war correspondents virtual members of the armed forces, promoting and supporting the military’s information operations.

Censorship continued to hamper war correspondent reporting during World War II (1939–1945).³⁸ However, censorship was not so readily used to support the national political agenda as much as to promote operational security.³⁹ As a result, journalists overwhelmingly cooperated in enforcing “voluntary” guidelines promulgated by the U.S. Office of Censorship established under the 1941 War Powers Act.⁴⁰ Every written report was subject to censorship, otherwise war correspondents were denied clearance to the war theater.⁴¹ At the front, journalists joined press camps and moved and lived amongst the

Army during the Battle of Bull Run, and was sent home to England by the Union. *Id.* Aside from public interest, war coverage was also considered by many to be the fashion of the day. *Id.*

²⁸ VAUGHN, *supra* note 25, at 84. Telegraph communication was subject to prior censorship, reporters were often barred from the field and newspapers were subject to closure for printing offensive matter. *Id.* In one instance, U.S. Secretary of War Edwin Stanton ordered the seizure of a Washington D.C. newspaper which violated censorship rules. *Id.* General Ambrose Burnside had the *Chicago Times* seized and closed for three days after it criticized him, President Abraham Lincoln, and other government officials. *Id.*

²⁹ ROTH, *supra* note 14, at 4–5.

³⁰ VAUGHN, *supra* note 25, at 85.

³¹ In 1880, while waiting for the Sioux tribal leader Sitting Bull to surrender, a war correspondent was required to join a skirmish line to fight off the Indians. ROTH, *supra* note 14, at 7, 87. During the Indian Wars (1860–1890), reporters did not have the luxuries of ready access to towns, railroads and telegraphs as they did in the Civil War. *Id.* at 7. Instead, most journalists were required to live with the military units as they traveled to and from the battlespace. *Id.*

³² Censorship of war correspondent reporting actually gained popularity with the initiation of the Boer War in South Africa (1899–1902). VAUGHN, *supra* note 25, at 85. This conflict virtually extinguished the independence of the war correspondent. *Id.* Censorship was also a similar barrier in the Russo-Japanese War (1904–1905). *Id.*

³³ *Id.*

³⁴ A “mediated war” is where warfare essentially becomes conflicts and controversies between parties who indirectly exchange information and arguments via the mass media and war correspondents on the front lines in order to gain public support and persuade opponents. Hans Mathias Kepplinger et al., *Instrumental Actualization: A Theory of Mediated Conflicts*, 6 EUR. J. OF COMM., No. 3, at 263–90 (1991).

³⁵ *Id.*

³⁶ The U.S. Committee on Public Information (1917–1919), headed by George Creel distributed vast amounts of pro-war materials to newspapers and other media agencies, while also publicizing that freedom of expression could be limited in war emergencies. VAUGHN, *supra* note 25, at 85.

³⁷ *Id.* Reporters interesting in covering the war were required to take an oath of loyalty to the U.S. government and post a \$10,000 bond in order to obtain accreditation. *Id.* Many newspapers of the leftist persuasions were banned under the Espionage Act of 1917 and the Sedition Act of 1918. *Id.*

³⁸ *Id.*

³⁹ *Id.*; see also *Near v. State of Minnesota*, 283 U.S. 697 (1931) (banning forms of media censorship by government as violating the First Amendment’s right to liberty of press and speech).

⁴⁰ VAUGHN, *supra* note 25, at 85. The 1941 War Powers Act banned publishing material on subjects such as military plans, intelligence operations and new weapon systems. *Id.*

⁴¹ *Id.*

troops.⁴² They often accompanied units into battle, allowing the public to get a close and personal view of the war.⁴³ It was even common for war correspondents to wear the uniforms of officers.⁴⁴ By the war's conclusion, war correspondents had again become "the propaganda arm of [the] government" as in World War I, except this time they were more willing participants due to the patriotic fervor and belief that World War II was a war of national survival.⁴⁵

2. Post-World War II Reporting: Access and Strategy Development

In post-World War II conflicts, the press and military "managed their interactions in a variety of ways, sometimes adhering closely to the tensions and conflicts of the past, and at other times actively seeking new ways of engagement."⁴⁶ At the outset of the Vietnam War (1960–1975), the U.S. military expanded the cooperative working relationship with the war correspondent that had been established in World War II and virtually eliminated censorship.⁴⁷ The journalist also had unprecedented access to the battlefield, "due largely to the growth of television as a popular mainstream medium for prime-time news."⁴⁸ War correspondents like Joe Galloway even embedded with Soldiers in battle.⁴⁹ The military's agenda was to use the media to garner public support for the war.⁵⁰ However, as the conflict prolonged and the "political consensus" viewed the U.S. military role in Vietnam as unfavorable, the "press-military relations soured."⁵¹ In fact, these relations left a mutual legacy of "mistrust and skepticism" that spilled over into future U.S. military operations.⁵²

The Vietnam experience led the U.S. military to maintain greater control of press access in times of military engagement due to mistrust of the media by many senior military leaders.⁵³ As a result, in Grenada (1983), war correspondents were not permitted to accompany the Marines during the invasion.⁵⁴ Instead, the U.S. military cited "operational security and the

⁴² Porch, *supra* note 17, at 88.

⁴³ There were 558 accredited print and radio correspondents assigned to the Normandy Landing campaign but fewer than 30 journalists hit the beaches of Normandy, France with the troops on 6 June 1944. FREDERICK S. VOSS, REPORTING THE WAR: THE JOURNALISTIC COVERAGE OF WORLD WAR II, at 8 (1994). Correspondents filed over 700,000 words alone on D-Day, 6 June 1944. *Id.* Famed World War II correspondent, Ernie Pyle, captured the hearts of Americans as he told the personal stories of the men in battle, by following the troops to North Africa, Sicily, Italy, France and the Pacific. *See generally* JAMES TOBIN, ERNIE PYLE'S WAR: AMERICA'S EYEWITNESS TO WORLD WAR II (1997); ERNIE T. PYLE, BRAVE MEN (Henry Holt and Co., Inc., 1944) (1943).

⁴⁴ Porch, *supra* note 17, at 88.

⁴⁵ VAUGHN, *supra* note 25, at 86 (quoting a Canadian journalist for *Reuters* news agency who claimed that censorship was initially enforced, but then journalists self-imposed censorship as an act of patriotism).

⁴⁶ PAUL & KIM, *supra* note 15, at 36 (discussing the various legacies of combat journalism in the post World War II era).

⁴⁷ In contrast to World War II and other earlier conflicts, the U.S. military in Vietnam did not impose censorship techniques due to the type of combat operations. FRANK AUOKOFER & WILLIAM P. LAWRENCE, FREEDOM FORUM FIRST AMEND. CTR., AMERICA'S TEAM; THE ODD COUPLE: A REPORT ON THE RELATIONSHIP BETWEEN THE MEDIA AND THE MILITARY 43 (1995). In Vietnam, combat operations consisted of widespread small-unit actions, conducted mostly during daylight hours, as opposed to large scale combat missions. *Id.* Reporters were transported to the field via military transportation, often accompanied by public affairs personnel. *Id.* War correspondents were free to observe and report combat operations mainly because there was not a strong imperative for secrecy. *Id.* Consequently, news stories went out unimpeded by any security review. *Id.* Interestingly, it is arguable whether the strained relationship between the media and military has anything to do with censorship, as the relationship seemed better in World War II when censorship was heavily supported. Porch, *supra* note 17, at 85–86. Instead, some believe the absence of a U.S. victory in Vietnam accounts for this strained relationship. *Id.*

⁴⁸ PAUL & KIM, *supra* note 15, at 37.

⁴⁹ Beginning in early 1965, Joe Galloway served three tours in Vietnam as a war correspondent with *United Press International*. *See generally* LIEUTENANT GENERAL HAROLD G. MOORE & JOSEPH L. GALLOWAY, WE WERE SOLDIERS ONCE . . . AND YOUNG (1992). In November 1965, at Landing Zone X-ray in the Battle of Ira Drang Valley, Galloway embedded with the 1st Cavalry Division and rescued numerous wounded American Soldiers under heavy enemy fire. *Id.* Later in 1998, Galloway was awarded the Bronze Star with V device by the U.S. Army. *Id.* He was the only civilian awarded a medal of valor from the Vietnam War. *Id.*

⁵⁰ PAUL & KIM, *supra* note 15, at 37.

⁵¹ *Id.* The media's coverage often differed drastically from the U.S. government administration's reports on war events, especially the body count. *Id.* Eventually, the press-military relations got worse after the 1968 Tet Offense, when reporters went from being skeptical to outright mistrusting the military. *Id.*

⁵² *Id.* at 36, 38–39. While Vietnam era journalists distrusted the military, the military viewed the press as being subversive and unpatriotic. *Id.*

⁵³ Control of access meant keeping the media controlled during the opening days of an engagement and allowing the military to become the primary, if not the only, source of information during the time of war. Steger, *supra* note 17, at 987.

⁵⁴ PAUL & KIM, *supra* note 15, at 36, 38–39. *See generally* CHARLES C. MOSKOS, THE MEDIA AND THE MILITARY IN PEACE AND HUMANITARIAN OPERATIONS, CANTIGNY CONFERENCE SERIES (Chicago: McCormick Tribune Found., 2000) (suggesting that the U.S. press policy during the Grenada period might have been modeled by Great Britain's policy to have complete control over reporters during the 1982 Falklands War).

personal safety of the reporters" as reasons to prevent reporter access.⁵⁵ Moreover, planning for media involvement in combat operations was not deemed critical to the military mission.⁵⁶ These events led to the Sidle Commission recommending the creation of the DoD National Media Pool in 1985.⁵⁷ The pool was designed to contain a preselected group of reporters that could be activated in the event of late-breaking or secret operations.⁵⁸ However, the implementation of the press pool in the Panama invasion (1989) failed due to the lack of prior military coordination.⁵⁹ This failure led then Chairman of the Joint Chiefs of Staff, General Colin Powell to more acutely define the role of the war correspondent in military operations by directing that,

the media aspects of military operations are important . . . [and] media coverage and pool support must be planned simultaneously with operational plans and should address all aspects of operational activity, including direct combat, medical, prisoner of war, refugee, equipment repair, refueling and rearming, civic action, and stabilization activities. Public Affairs annexes should receive command attention when formulating and reviewing all such plans.⁶⁰

Media experts believe this directive forever "changed the attitudes with the military and convinced commanders that public affairs planning was an important part of overall operational planning, not just the responsibility of public affairs officers."⁶¹ As a result, the Panama conflict spawned a new military movement to better integrate the media into military combat missions while still balancing operational security concerns.⁶²

The First Gulf War (1990–1991) required a higher level of military-press cooperation to address the need for media integration into the combat mission. It was America's first war where war correspondents could instantaneously broadcast their stories to the world.⁶³ The military had good intentions to increase media access, but operational secrecy still threatened media relations due to the mission.⁶⁴ In response, the military created an elaborate system of accreditation, press pools, and military-media escorts to be used until the conflict ceased.⁶⁵ While this system increased the war correspondent's coverage of the war, censorship issues limited their reporting effectiveness.⁶⁶

Censorship became an issue for two primary reasons during the First Gulf War. First, the pool system imposed blackout periods during key operational phases and limited access by requiring the review of all printed reports prior to press release.⁶⁷ Secondly, war correspondents became frustrated they could not report their stories alongside the military, causing some to

⁵⁵ PAUL & KIM, *supra* note 15, at 39.

⁵⁶ Based upon the Vietnam experience, the prevailing view among commanders was that the news media should be handled only by assigned public affairs (PA) personnel, separate from the operational mission. AUKOFER & LAWRENCE, *supra* note 47, at 44–45. Consequently, in Grenada, commanders excluded PA from the operational aspects of the deployment process. *Id.*

⁵⁷ As a result of the Grenada debacle, the DoD appointed retired Major General Winant Sidle to review the military's press policy after numerous news organizations accused the administration of violating their First Amendment Constitutional rights by not allowing media access to combat operations. PAUL & KIM, *supra* note 15, at 40. The Commission's 1984 recommendations culminated in the creation of the DoD National Media Pool (DNMP). *Id.* at 40; *see also* AUKOFER & LAWRENCE, *supra* note 47, at 44 (explaining the practical effect of the Sidle Commission's recommendations on Public Affairs).

⁵⁸ PAUL & KIM, *supra* note 15, at 40.

⁵⁹ *Id.*

⁶⁰ AUKOFER & LAWRENCE, *supra* note 47, at 44–45 (directing military commanders to think seriously about the coordination of media into the operational process).

⁶¹ *Id.* at 45.

⁶² *Id.*

⁶³ *Id.* at 11.

⁶⁴ The nature of the "left hook" surprise attack through southern Iraq into Kuwait with Coalition forces spread on a 300 mile front created a concern that media accessibility would cause an information leak. *Id.* at 9. Lack of press access also stemmed from Secretary Cheney's belief that the press was irresponsible and had to be controlled. *See also* Steger, *supra* note 17, at 974.

⁶⁵ The military developed an ad hoc system of combat pools which the news organizations helped to set-up. Steger, *supra* note 17, at 973.

⁶⁶ The combination of security review and the use of the combat pool system worked together as a form of censorship to limit access. PAUL & KIM, *supra* note 15, at 42–43. Some journalists complained that the denial of access permitted under the combat pool system was actually worse than the censorship, because entire stories were never allowed to be told due to imposing military commanders in the field. AUKOFER & LAWRENCE, *supra* note 47, at 11, 17. For example, reporters could not tell the story that the famed battleship, U.S.S. *Missouri*, fired naval gunfire for the first time since World War II during Operation Desert Storm. *Id.*

⁶⁷ PAUL & KIM, *supra* note 15, at 42–43.

unilaterally venture off at their own peril.⁶⁸ After all, of the 1600 reporters approved to cover the war, only 186 accompanied combat units into action.⁶⁹ However, despite these limitations, journalistic output was extremely large compared to previous conflicts.⁷⁰ In fact, it was primarily due to a more media savvy military leadership that “some of the most extensive controls ever on information and press coverage” were implemented.⁷¹ This mindset permitted the DoD to later adopt the nine *Principles for News Media Coverage of DoD Operations*.⁷² As a guide for all future coverage of U.S. military engagements, these DoD principles were critical to the growth of embedded combat journalism, by replacing the pool system as the standard means of combat coverage with “open and independent reporting.”⁷³

3. Dawn of the Modern Embedded Press System

Journalists’ objections to the pool system revived the embedded media approach first used in World War II and Vietnam, although now far more formal and planned than in the past.⁷⁴ The Bosnia War (1992–1995) first introduced the term “embedded press” to describe a type of press procedures.⁷⁵ The procedures involved a reporter “being assigned to a unit, deploying with it, and living with it throughout a lengthy period of operations.”⁷⁶ Furthermore, the concept of security review became less of a formal censorship mechanism imposed by higher military.⁷⁷ Instead, each servicemember acted as a spokesperson for the military.⁷⁸ At least as an informal mechanism, the military eliminated field censorship by adopting “security at the source” as its operational security strategy.⁷⁹ The so-called “Ricks Rule” also evolved amongst the military ranks during the Bosnia War, whereby all conversations with war correspondents were considered off the record unless specified.⁸⁰ Although this rule was not recognized by the media, the battlefield accessibility afforded to journalists by the embedded process encouraged them to respect Soldiers’ privacy as well as operational security concerns.⁸¹ Overall, the new

⁶⁸ *Id.* CBS reporter Bob Simon and several camera crew members were captured by Iraqi soldiers when they ventured outside the pool system. *Id.* CNN reporters like Peter Arnett actually reported unilaterally from Baghdad during the first wave of bombing at their own peril. *Id.*

⁶⁹ *Id.* at 43. The establishment of the combat pool system arose out of the large amounts of war correspondents that could not be accommodated in combat units during Operation Desert Storm. *See also* AUOKFER & LAWRENCE, *supra* note 47, at 45.

⁷⁰ During the air and ground war, 1352 pool reports were filed with photographers providing as much as 180 rolls of film per day. AUOKFER & LAWRENCE, *supra* note 47, at 10–11. Nevertheless, much of this information could not be released due to the ineffective pool system which produced delayed reporting and stories of dubious quality. *Id.*

⁷¹ PAUL & KIM, *supra* note 15, at 43–44. General Norman Schwarzkopf did not want to repeat the mistakes the military made in dealing with the media in Grenada. *Id.* Instead, he was a strong proponent of conducting media briefings in order to gain the public’s support for the war effort. *Id.*

⁷² *Id.* at 45–46; U.S. DEP’T OF DEFENSE, DIR. 5122.05, ASSISTANT SECRETARY OF DEFENSE FOR PUBLIC AFFAIRS (ASD(PA)) para. E3.1 (reissued 5 Sept. 2008) [hereinafter DoDD 5122.05] (rescinding DoDD 5122.5, 27 Sept. 2000); *see infra* App. B. The original DoD principles were introduced in 1992 and represented the first formalized adoption of written standards for media integration into combat operations created through direct military-media cooperation. DoDD 5122.5, *supra*. Intervention actions in Somalia (1992) and Haiti (1994) have shown that the standard media/military principles are less applicable during certain lower intensity operations as compared to major military operations. Porch, *supra* note 17, at 99. In humanitarian operations, unlike wartime, national survival is not at stake and the main effort is political rather than military. *Id.* Thus, censorship is seldom an issue, operational security is not as important, and the military has less control to limit media access. *Id.* These factors create different media/military relations dynamics. *Id.*

⁷³ The first principle replaced the pool system with the new open and independent reporting system. AUOKFER & LAWRENCE, *supra* note 47, at 20–21. A tenth principle was proposed requiring military review of news for operational security reasons, but neither the media nor the military could agree. *Id.* However, given today’s advances in technology, such as satellite telephones, many military leaders now agree that security review or censorship is a thing of the past. *Id.* Veteran reporter Walter Kronkite claimed that the Pentagon’s pool system severely restricted reporters and photographers from accompanying troops into action as had been permitted in all previous wars. Porch, *supra* note 17, at 96–97. Being that pools were not popular with the media, the new standard of open and independent reporting was welcomed with open arms. *Id.*

⁷⁴ PAUL & KIM, *supra* note 15, at 48; Porch, *supra* note 17, at 97.

⁷⁵ PAUL & KIM, *supra* note 15, at 48. For Task Force Eagle, thirty-three reporters were embedded in fifteen different units for approximately one month. *Id.* Some reporters were embedded in Germany with units prior to deployment. *Id.*; *see also* Moskos, *supra* note 54 (describing in detail the embedding of reporters for Task Force Eagle and their deployment schedules).

⁷⁶ PAUL & KIM, *supra* note 15, at 48; Porch, *supra* note 17, at 97.

⁷⁷ Porch, *supra* note 17, at 97.

⁷⁸ *Id.*

⁷⁹ Security at the source is operational strategy whereby military personnel agree to be circumspect in deciding what information to release. PAUL & KIM, *supra* note 15, at xvi, 70.

⁸⁰ Reporter Tom Ricks published a story concerning a U.S. battalion commander who told his African-American troops that the Croats were racists. Porch, *supra* note 17, at 98. In response, many military members feared that everything they said was suitable for reporting. *Id.* Although the “Ricks rule” is not formally recognized by the media as being binding, journalists commonly abide by this rule in practice. *Id.*

⁸¹ Reporters also followed rules that prohibited reporting on intelligence collection, special operations, and casualties. *Id.* at 97.

approaches adopted by the military and the media in dealing with operational security concerns in the Bosnia War, redefined the older embedded reporting concept into a new, viable means of more formalized combat press procedures.⁸²

The Kosovo Conflict (1998–1999) marked a new era in the U.S. military's view of the interrelationship between information operations and embedded journalism.⁸³ Due to the nature of the air war in Kosovo, the embedded press system effectively allowed for less media access than the ground war in Bosnia.⁸⁴ Consequently, war correspondents felt they could not cover the ethnic cleansing story and opted to cover the war through the use of the enemy central command.⁸⁵ Slobodan Milosevic, then President of the Federal Republic of Yugoslavia, welcomed war correspondents as a means of promoting enemy propaganda against the NATO campaign.⁸⁶ When NATO failed to anticipate Milosevic's propaganda ploys, it was put on the defensive in the battle of world opinion by a weaker military opponent.⁸⁷ These circumstances created a view among some military leaders that "public information is a battle space . . . that must be contested and controlled like any other."⁸⁸ In fact, NATO leadership acknowledged this necessity when they targeted a Serbian television station with the intent to eliminate the "pro-government propaganda apparatus."⁸⁹ Military leaders recognized that combat journalists could be used as "force multipliers" on the battlefield—developing public opinion and enhancing military morale.⁹⁰ A renowned military historian summed up the contribution of information operations during combat when stating that, "the view emerged [from Kosovo] that the will of a population to prosecute a conflict can be undermined by media-generated images, and that therefore, the media strategy must be an integral part of a campaign plan."⁹¹

The terrorist attacks of 11 September 2001 thrust the U.S. military into a war against non-state actors (al Qaeda) and the regime (Taliban) that harbored them.⁹² Interestingly, the Afghanistan War (2001–present) did not build upon the momentum

⁸² The Bosnia War (1992–1995) was the first military engagement to use the modern embedded press system, although on a small scale. PAUL & KIM, *supra* note 15, at 48, 58.

⁸³ Porch, *supra* note 17, at 101.

⁸⁴ Journalists embedded with air units during Operation Allied Force did not have the same type of access as that of ground units in Bosnia because few of the effects of high-level bombing could be witnessed from the air. PAUL & KIM, *supra* note 15, at 48–49; see also Porch, *supra* note 17, at 100–01 (providing the different options available to journalists in reporting the air war campaign).

⁸⁵ PAUL & KIM, *supra* note 15, at 49.

⁸⁶ The press was provided the incentive to report Serb and Russian accounts of an accidental bombing of refugees by NATO near Djakovica in April 1999, when spokespersons from NATO, the Pentagon, and the Supreme Allied Commander contradicted each other concerning the event. Porch, *supra* note 17, at 101. As a result, collateral damage then became the premier media story rather than ethnic cleansing. *Id.*; see also PAUL & KIM, *supra* note 15, at 49 (describing Milosevic's pursuits to give media access to results of the allied bombing campaign).

⁸⁷ NATO's lack of media specialists, unstaffed press offices, and lack of media coordination in integrating public relations/information campaign put it at a significant disadvantage from a military information operations standpoint. Porch, *supra* note 17, at 101. In addition to combating the propaganda problem, NATO grew increasingly frustrated with its inability to control press access to the battlefield due to new technology considerations. PAUL & KIM, *supra* note 15, at 50. Outright denial of access no longer worked when war correspondent's filed directly from the field via the internet, cell phones, and remote-area network data systems sending video signals. Porch, *supra* note 17, at 103.

⁸⁸ Porch, *supra* note 17, at 101 (quoting Colonel Jack Ivy, Deputy Director of U.S. Air Force Public Affairs Center for Excellence, Maxwell Air Force Base, Ala.); see *infra* note 281.

⁸⁹ On 23 April 1999, NATO launched a cruise missile specifically targeting the headquarters of the Radio Television Serbia (RTS) broadcast station in central Belgrade which contained more than 120 civilians at the time. Richard J. Butler, *Modern War, Modern Law, and Army Doctrine: Are We in Step for the 21st Century*, 32 PARAMETERS No. 1, Spring 2002 (U.S. Army War College Quarterly), available at <http://www.carlisle.army.mil/USAWC/Parameters/02spring/butler.htm> (citing the UN, ITCY, *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, 8 June 2000). The bombing killed sixteen persons and injured another sixteen persons, all civilians. *Id.* In response, then British Prime Minister Tony Blair stated that NATO's justification for targeting RTS was because "the media is the apparatus that keeps Slobodan Milosevic in power and we are entirely justified as NATO allies in damaging and taking on those targets." *Id.* These events sparked intense international media criticism for specifically targeting the media. *Id.* NATO also argued that RTS was a government owned and controlled facility would not release intelligence documents that allegedly supported that the broadcast station was a legal target. *Id.* The UN Final Report regarding this incident claimed that NATO intentionally bombed RTS. *Id.*; see also Kyodo News Int'l, Inc., *Thai Journalists Protect NATO Bombing of Serb TV*, ASIAN POL. NEWS, May 17, 1999, available at <http://findarticles.com> (providing a detailed account of the RTS bombing and summation of the UN Final Report).

⁹⁰ AUKOFER & LAWRENCE, *supra* note 47, at 4, 12. United States Marine General Walt Boomer was adept at using the media to enhance the military's image and increase unit and family morale. *Id.* In fact, some critics believe that the Marines fared better in receiving positive combat credit than the U.S. Army due to General Boomer's actions. *Id.*

⁹¹ Porch, *supra* note 17, at 101. Porch claims that technology considerations thwarted the military's ability to control press information disclosure where it deemed appropriate. *Id.*

⁹² The Afghanistan War began on 7 October 2001 as the United States and United Kingdom launched Operation Enduring Freedom (OEF) in response to the 11 September 2001 attacks. PAUL & KIM, *supra* note 15, at 50. The purpose of the invasion was to capture Osama bin Laden, destroy the al-Qaeda terrorist group, and remove the Taliban regime. *Id.* The U.S. Bush Doctrine stated that it would not distinguish between al-Qaeda and nations that harbored them. *Id.*

created by the modern embedded system used in Kosovo.⁹³ Instead, the nature of the military operation called for a more restrictive press policy.⁹⁴ Despite stifling media access, journalists complied with these policies because of the severe national security issues posed by the U.S. terrorist attacks.⁹⁵

In Afghanistan, restrictive press policies made it difficult for the military to balance operational security concerns with the need to combat the “steady purveyor[s]” of enemy propaganda as it had in Kosovo.⁹⁶ The popular Arab satellite television station al-Jazeera was destroyed in Kabul, Afghanistan with precision guided munitions⁹⁷ based upon intelligence reports that al-Jazeera routinely transmitted “calls-to-arms” videos featuring Osama bin-Laden and Saddam Hussein.⁹⁸ At DoD news conferences, U.S. officials denied that the media was specifically targeted.⁹⁹ However, Pentagon advisor Frank Gaffney, Jr. suggested the media was intentionally targeted by stating that, “It would be no more sensible for us to construe the masquerading of enemy propaganda, the communication and amplification of its call to *jihad* and the legitimacy that attends transmission of such messages . . . than it would be for us to regard bin Laden’s messages, or Saddam’s, as mere ‘news.’”¹⁰⁰ Some prominent DoD leaders then established the belief that “the enemy media [should] be taken down” when it is used as “instruments of war” against the allies.¹⁰¹ While the Afghanistan War did not directly contribute to the improvement of the embedded system per se, it did provide a new framework for understanding military information operations and the role combat journalists would later play in the Iraq War (2003–present).

The invasion of Iraq coincided with what many journalists have called the “triumph of the embedded process.”¹⁰² At the outset of the Iraq War, DoD called for a massive deployment of reporters to embed with troops, while imposing few constraints.¹⁰³ This event culminated in the first broad implementation of the modern embedded press system in history, allowing reporters unprecedented access to the battlefield.¹⁰⁴ Several key factors encouraged the military to take this approach: (1) the demand for more access to combat coverage, (2) the impracticability of large-scale censorship due to

⁹³ *Id.*

⁹⁴ The ground war was difficult to cover due to the heavy usage of special operations forces which conducted missions covertly by using classified equipment and techniques. *Id.* at 50–51. Even the launch base for numerous special operations units was inaccessible to war reporters. *Id.*

⁹⁵ Press response to the restrictive media access policy is more akin to their cooperation during World War II where national survival was at stake, as compared to restrictions imposed in the Gulf War and the Kosovo War which received significant protest by the media. *Id.* at 51.

⁹⁶ Frank Gaffney, Jr., *Take Out al Jazeera*, FOX NEWS, Sept. 29, 2003, available at <http://www.foxnews.com/story/0,2933,98621,00.html>.

⁹⁷ On 13 November 2001, the United States dropped a 500 pound bomb on the al-Jazeera TV station located in the heart of Kabul during the invasion. Steve James, *Why the US Bombed al-Jazeera’s TV Station in Kabul*, WORLD SOCIALIST WEB SITE, Nov. 21, 2001, <http://www.wsws.org/articles/2001/nov2001/jaz-n21.shtml>. The blast also caused damage to nearby BBC and Associated Press offices with no casualties. *Id.* Other news agencies, such as BBC World, vocalized their criticism for targeting news organizations during the Newsworld Conference of media executives held in Barcelona. *Id.* During the initial invasion, al-Jazeera had almost exclusive media access to the Taliban-held territory and the Islamic-militia itself. *Al-Jazeera Kabul Offices Hit in US Raid*, BBC News, Nov. 13, 2001, available at http://news.bbc.co.uk/2/hi/south_asia/1653887.stm. Western governments claimed this news agency was being used to pass on coded messages to al-Qaeda supporters around the world. *Id.*

⁹⁸ Gaffney, *supra* note 96.

⁹⁹ James, *supra* note 97.

¹⁰⁰ Gaffney, *supra* note 96. Mr. Gaffney held senior DoD positions under President Reagan’s administration and was the President of the Center for Security Policy. Compare *id.*, with *Also Why NATO Bombed Serb TV*, Serbian News Network, <http://www.antic.org/Weblog/2005/12/why-nato-bombed-serb-tv.html> (citing that DoD provided conflicting reasons as to why it bombed the Kabul al-Jazeera station, to include it was an accident and it was a known al-Qaeda facility).

¹⁰¹ Gaffney, *supra* note 96.

¹⁰² PAUL & KIM, *supra* note 15, at 51; see also Jack Shafer, *Embeds and Unilaterals*, SLATE, May 1, 2003, available at <http://slate.msn.com/id/20824122> (quoting war correspondent’s who positively viewed the embedded system). Operation Iraqi Freedom (OIF) commenced on 20 March 2003 with the invasion of Iraq by U.S. and British forces.

¹⁰³ The formal system of embedding ended shortly after President George W. Bush declared an end to major combat operations in Iraq on 1 May 2003. PAUL & KIM, *supra* note 15, at 52. During the six week period of major combat operations, 400 journalists embedded with the U.S. Army, eighteen with the U.S. Air Force, 150 with the U.S. Marines, and 141 with the U.S. Navy. *Id.* Nearly 100 of the war correspondents were foreign reporters including a few al-Jazeera reporters (although they were attached to rear units that never left Kuwait). *Id.* The British embedded 128 journalists. *Id.* The total number of reporters (including embedded journalists) tolled 2200 and included 1445 reporters operating unilaterally. *Id.* Following 1 May 2003, many embedded reporters left their units to return to traditional reporting techniques such as unilateral reporting. *Id.* But see Shafer, *supra* note 102 (claiming that the embedded system effectively created a credentialing system among reporters where embedded reporters would get all the stories, but the military treated unilateral reporters as if they had no right to the battlefield).

¹⁰⁴ PAUL & KIM, *supra* note 15, at 51. Some commanders allowed embedded journalists access to war plans and other essential, but unclassified information. Colonel Franklin Childress, Operation Iraqi Freedom Media Embedding: Wave of the Future or Flash in the Pan 13 (Mar. 18, 2005) (unpublished manuscript, on file with the U.S. Army War College). Rick Atkinson, *Washington Post*, and Jim Dwyer, *New York Times*, had access to war plans by Major General Petraeus when he was the 101st Division commander. *Id.* (citing ALICIA C. SHEPARD, NARROWING THE GAP: MILITARY, MEDIA AND THE IRAQ WAR 32 (2004)).

technology considerations, (3) a better understanding by DoD of how media coverage supported its own military objectives, and (4) public expectations.¹⁰⁵ Of these factors, DoD's use of the media to support operational objectives was fundamental to changing the war correspondent's role on the battlefield.

In early 2001, the Assistant Secretary of Defense for Public Affairs and numerous press personnel assembled to create the ground rules for the embedded press system, culminating in the Coalition Forces Land Component Command Ground Rules Agreement.¹⁰⁶ The DoD reserved the right to select which reporters received the "choicest embed slots."¹⁰⁷ War correspondents were requested to embed with their assigned unit at the unit's home station prior to arriving in Iraq in order to facilitate the military integration process.¹⁰⁸ Upon assignment, they would remain with their unit for the duration of combat operations.¹⁰⁹ This process was designed to provide the highest level of war correspondent coverage without sacrificing operational security.¹¹⁰

Proper integration of this plan required that war correspondents receive the necessary tools to be successful in combat conditions. Journalists traveling with combat units were sent to "boot camps" designed to familiarize war correspondents with operating safely on the battlefield.¹¹¹ In theater, journalists were required to have the same equipment available to military personnel.¹¹² The training and equipment helped war correspondents cope with the austere conditions encountered during combat—from the initial invasion of Iraq and the many firefights that ensued, to the fall of Baghdad.¹¹³

Training and equipping journalists, however, was not the only ingredient for successful implementation of the embedded system. Early in the embedding planning process, DoD recognized its need to improve the communication between the public affairs system and the press.¹¹⁴ The PAOs were directed to act as liaisons to war correspondents without interfering with reporting activities, while ensuring that commanders embraced the embedding concept and followed "security at the

¹⁰⁵ PAUL & KIM, *supra* note 15, at 52. International News Safety Institute (INSI) and the Military Reporters and Editors (MRE) group demanded more accessibility to combat coverage. *Id.* Advanced communications and information technology made large-scale censorship impractical. *Id.* The general public's demand for news coverage of the Iraq War was partly attributable to the sheer scale of the war itself. *Id.*

¹⁰⁶ *Id.* at 53. Victoria Clarke, the ASD(PA), has been widely regarded as one of the primary architects of the modern embedded press system. *Id.* at 52–53. The agreement she employed allowed embedded journalists to consult unit commanders prior to releasing information; have free access to military personnel at all levels; report general information about troop strength, casualties, and captured enemy reports; report the information and location of military targets and objectives previously under attack; and report names and hometowns of servicemembers upon their consent. *Id.* In return, reporters could not: carry weapons, use private transportation, break-away from the unit for outside stories, take photos of defense installations and prisoners of war, use casualty name information prior to contacting the next-of-kin, or provide details of future operations. *Id.* There was no provision prohibiting reporters from wearing military uniforms during OIF. In fact most reporters were provided kevlar helmets and protective vests. *Id.* The DoD's Nine Principles of Combat Coverage would also be applicable to reporters in OIF. DoDD 5122.5, *supra* note 72.

¹⁰⁷ PAUL & KIM, *supra* note 15, at 53.

¹⁰⁸ This plan worked with mixed results and the bulk of the embedded media did not embed until they arrived in Kuwait, particularly in the case of the Third Infantry Division (3ID) and the Marine Expeditionary Force (IMEF). Childress, *supra* note 104, at 7.

¹⁰⁹ War correspondents that left their units prematurely were not allowed to return to the unit in combat. *Id.* at 3, 11.

¹¹⁰ Security leaks during the major combat operation phases of OIF were not as much a problem as once feared by military leadership. PAUL & KIM, *supra* note 15, at 53, 56. In fact, fewer than six reporters were removed for committing security violations, and most of those reporters were reporting unilaterally, not as part of the embedded process. *Id.* Probably the most popular "disembedding" incident involved Fox News reporter Geraldo Rivera who drew a map in the sand of the 101st Airborne Division's location during combat. *Id.*

¹¹¹ *Id.* at 53. United States Army drill sergeants provided war correspondents basic combat survival skills at Quantico, Virginia and Fort Benning, Georgia. *Id.* It is estimated that over 300 journalists participated in the DoD initiated training. John Burnett, *Combat School for Journalists*, NPR, Jan. 15, 2003 available at <http://www.npr.org>. War correspondent's were taught combat skills on how to: provide immediate medical attention to wounded U.S. soldiers until medics arrived, operate on military helicopters, detect land mines, survive a chemical weapons attack, conduct land navigation, and low crawl. *Id.*; see also *UN to Fund Combat Zone Training for PA Journalists*, ISRAEL NAT'L NEWS, Nov. 2007, available at <http://findarticles.com> (explaining that UNESCO funded a hostile environment reporting course for Arab journalists, whom also received body armor).

¹¹² For example, war correspondents received NBC equipment to combat the acute threat of chemical and biological weapons. Childress, *supra* note 104, at 6.

¹¹³ According to Colonel Gary Hovatter, Chief of the Army Public Affairs Center, approximately fifty or sixty journalists had "front row seats for combat." *Id.* at 11. During combat many war correspondents reported their stories via military means because they were prohibited from using the popular Thuraya satellite phones specifically designed to work in the Middle East. *Id.* at 8–9. These phones also had global positioning systems which posed a threat to operational security. *Id.* Nevertheless, there were inconsistent interpretations of the ban on these phones by the different military services. *Id.* The Army allowed the media to keep their phones in some instances while the Marines confiscated them. *Id.*

¹¹⁴ PAUL & KIM *supra* note 15, at 53. On 27 January 2003 each of the military branches provided individual augmentees from their respective PAO to form the Joint Information Bureaus (JIB) to be located in Kuwait, Bahrain, Qatar and Cyprus. Childress, *supra* note 104, at 1. The JIB was under the leadership of Jim Wilkerson, Public Affairs Special Assistant to General Franks. *Id.* The Kuwait JIB executed the largest share of the DoD's Media Embedding Program and later became known as the Coalition Press Information Center (CPIC), working with the Coalition Land Forces Command (CFLCC) at Camp Doha, Kuwait. *Id.* at 2.

source" as their guiding operational security principle.¹¹⁵ The responsibility of the PAO was also extended to solving the logistical needs of embedded journalists on the battlefield¹¹⁶ to include their transportation,¹¹⁷ food provisions, and shelter. Overall, the proper use of training, equipment, and communication were all elements deliberately designed to be integrated with modern maneuver warfare capabilities to make the embedded system successful.¹¹⁸

Focused on winning "the war of words and images," DoD had multiple operational objectives for using the embedded press system.¹¹⁹ First, embedded reporting would better inform the public and grow coalition support by disseminating accurate and timely information.¹²⁰ Second, accurate press information would "counter adversary propaganda and erroneous information in the adversary's press."¹²¹ This strategy hinged upon having an objective war correspondent both observing and reporting, in real time, instead of relying on enemy news agencies or the Pentagon for information releases.¹²² Third, the embedded media would provide a form of control to prevent the dissemination of inaccurate information as a result of the command's failure to communicate.¹²³ Finally, the Operation Iraqi Freedom embedded press system would significantly contribute to the Public Affairs command strategy: "to help defeat adversary efforts to diminish national will, degrade morale, and turn world opinion against friendly operations."¹²⁴ At the end of major combat operations,¹²⁵ DoD's operational objectives were successfully met and the embedded system was touted as the model for future large-scale combat operations.¹²⁶

¹¹⁵ JOINT PUB. 3-61, *supra* note 2, at III-12, III-13; The rule that PAOs will act as liaisons, but should not interfere with the reporting process is a tenant of the nine DoD Principles for News Media Coverage of DoD Operations. DoDD 5122.5, *supra* note 72, at E.3.6.

¹¹⁶ Childress, *supra* note 104, at 2-11.

¹¹⁷ The prohibition of private vehicle use was a heated issue between the military and the press. *Id.* at 2. The military opposed the media having their own vehicles for reasons of control, logistics (provision of fuel and maintenance) and safety (lack of armored vehicles for protection). *Id.* at 2-4. However, some units (3ID and the IMEF) ignored this DoD/CFLCC policy and allowed them to have their own vehicles. *Id.* at 4 (providing examples where reporter David Bloom cruised the battlefield in his "Bloom Mobile" and Walt Rodgers traveled in his own vehicle to report images from the initial assault on Baghdad).

¹¹⁸ Current operations require U.S. armed forces to fight a closely coordinated sea-air-land battle employing high-speed maneuver warfare. AUOKOFER & LAWRENCE, *supra* note 47, at 45-46. The only way to have effective combat coverage is to position journalists within the units themselves, as opposed to having unilateral reporting where journalists try to cover battles on their own without direct military assistance. *Id.*

¹¹⁹ JOINT PUB. 3-61, *supra* note 2, at I-2 to I-8; *see also* Johanna Neuman, *Pentagon Plans to Deploy Journalists in Iraq*, L.A. TIMES, Dec. 4, 2002, available at <http://articles.latimes.com/2002/dec/04/world/fg-embed4> (winning the information war was of paramount concern to U.S. military strategists).

¹²⁰ PAUL & KIM, *supra* note 15, at 77-108 (providing data that the media had the highest public ratings for its combat coverage of any modern war); Neuman, *supra* note 119; JOINT PUB. 3-61, *supra* note 2, at I-2.

¹²¹ PAUL & KIM, *supra* note 15, at 52; Neuman, *supra* note 119; JOINT PUB. 3-61, *supra* note 2, at I-2.

¹²² The U.S. military recognized early on that properly employing the embedded system would prevent the enemy from gaining the upper hand in the information war as they had in Kosovo and Afghanistan, where reporters who were denied access went to the enemy for news coverage. PAUL & KIM, *supra* note 15, at 52 (quoting Ken Dilanian, *Seeking the Inside Story in an Iraq War*, PHILADELPHIA INQUIRER, Mar. 12, 2003). In Iraq, this concept paid dividends on multiple occasions when U.S. forces thwarted the Iraqi Minister of Information's spread of propaganda. *Id.* at 56-57. The Iraqi Minister of Information used embedded media in the invasion of Umm Qasr to spread false claims that U.S. forces were bogged down by Iraqi resistance. *Id.* However, U.S. embedded journalists, reporting with live coverage, exposed this claim as propaganda when, in reality, the Marines were advancing quickly through the area. *Id.*; *see also* JOINT PUB. 3-61, *supra* note 2, at I-2 (recognizing the interplay between modern military operations and advances in communication technology that creates the growing need for real-time information, and thus, higher level media cooperation).

¹²³ Reporters could observe events first hand as opposed to relying upon "canned" information provided from official military sources. JOINT PUB. 3-61, *supra* note 2, at I-2.

¹²⁴ *Id.* at I-3 to I-4. This strategy was intended to "scare the enemy into submission." PAUL & KIM, *supra* note 15, at 54; JOINT PUB. 3-61, *supra* note 2, at I-4, I-8 (suggesting that credible information used to undermine enemy propaganda can potentially cause dissent within adversary ranks). National security scholars recognized that the only real military advantage Saddam Hussein's regime possessed was its ability to wage an information war. Neuman, *supra* note 106 (quoting Jon B. Alterman, a scholar at the Center for Strategic and International Studies in Washington and Captain T. McCreary, public affairs advisor to U.S. Joint Chiefs of Staff Chairman Richard B. Myers).

¹²⁵ *See supra* note 103.

¹²⁶ PAUL & KIM, *supra* note 15, at 2 (quoting ASD(PA) Victoria Clarke, regarding the success of the embedded press system in OIF); *see also* Childress, *supra* note 104, at 1, 14 (discussing that OIF is widely recognized as one of the most successful ventures between the military and the media in history). This success was attributable to the military's willingness to integrate the embedded concept from the highest strategic level to the lowest unit on the ground. PAUL & KIM, *supra* note 15, at 52-53; *cf. id.* at 48-51 (suggesting that smaller scale conflicts are less suited to incorporating media where there are many special operations or air-sea engagements involved).

C. Historical Analysis of Strategies for Military-Press Organization

The historical framework provides the background as to how the modern embedded journalism system evolved.¹²⁷ However, understanding the role war correspondents will play on the battlefield in the context of any future embedded system¹²⁸ must also be evaluated within the context of the information access and operational security strategies employed in any given conflict.¹²⁹ Each type of conflict brings new, unique technology considerations, public informational demands, and combat mission requirements and capabilities which impact the quality of the press system to meet the competing goals of both the military and press.¹³⁰ It is also evident that “the views and actions of individuals in the military at both the highest and lowest levels of command can have important effects on the implementation or outcomes of policies governing press-military relations.”¹³¹

While there are pure forms of press information access¹³² and operational security strategies,¹³³ the future press system will likely be a hybrid based upon the failures and successes of past military operations. For example, the embedded system is particularly well suited for larger scale, ground combat type operations, but it may not be suitable for every combat mission.¹³⁴ Thus, analyzing the viability of the embedded system for use in future combat operations requires not only a historical narrative approach, but a systematic and quantitative approach to evaluating wartime military-press relations.¹³⁵

III. Legal Framework for Journalists in Combat

Understanding the implications of using the embedded press system in combat operations requires a discussion on the legal status and protections bestowed upon journalists working in the combat theater. If embedded journalism is to be viable in today’s military operations, it is critical to determine how a journalist can lose their protective status and become military targets under the laws of war.

A. Journalist Defined

Paramount to any discussion on combat journalism, is defining what constitutes a journalist according the law of armed conflict. It is critical to distinguish between war correspondents and freelance journalists as they incur different protections under the Geneva Conventions.¹³⁶ At the most practical level, the civilian media consists of members of the profession of

¹²⁷ See *infra*, App. C; PAUL & KIM, *supra* note 15, at 73.

¹²⁸ The author does not espouse that the embedded press system represents the future press system to be used for every type of combat mission, but rather that the particular circumstances and characteristics surrounding this type of press system may create legal implications under the laws of war when employed.

¹²⁹ PAUL & KIM, *supra* note 15, at 63–76.

¹³⁰ *Id.* at 26–27 (discussing the competing interest of the military to control access of information to preserve operational security versus the press’ objective of ensuring the public is provided a complete, unfettered perspective of the military mission at hand).

¹³¹ *Id.* at 4.

¹³² Denial of access, press pools, embedded journalism, and unilateral journalism are the four generally recognized forms of press information types. *Id.* at 65–68. Depending upon which type is used, three key factors vary: (1) the number of reporters to be provided access, (2) the sources of information made available to reporters, and (3) the level of safety afforded reporters in the field. *Id.* Under denial of access, information is not available to the public or press, but only to official sources. *Id.* The press pool system is a more open system of access where a small group of reporters agree to pool their resources with each other in order to gain access to otherwise unavailable sources of information. *Id.* Embedded journalism allows full access to information during combat operations for reporters who agree to travel with specific units throughout the military campaign. *Id.* at 65–68. The unilateral journalism allows the broadest freedom of access by reporters who either freely join or leave troops in the field. *Id.* Unilateral journalism is commonly referred to as “freelance,” “cowboy” or “four-wheel-drive” journalism. *Id.* Under this method, reporters reject the constraints of traveling with military as well as any military restrictions on access of information. *Id.* This method offers the least protection from the military during combat. *Id.*

¹³³ The three generally recognized types of information operational security strategies are: censorship, credentialing, and security at the source. *Id.* at 68–70. Under censorship, the military unilaterally decides what information cannot be released to the public. *Id.* Credentialing allows reporters to agree on their professional honor not to violate the confidence of the military in disclosing information. *Id.* Security at the source exists when military personnel agree to be circumspect in deciding what information to share with reporters. *Id.* Here, military personnel at any level make the judgment call on what information to release, taking into account the positive or negative impact it may have on the military mission. *Id.*

¹³⁴ The press pool rather than the embedded press may be better suited for secret operations where limited coverage is warranted or where only a small number of reporters can be physically accommodated due to mission requirements. *Id.* at 66–67.

¹³⁵ *Id.* at 114–15.

¹³⁶ Turner & Norton, *supra* note 7, at 12.

journalism.¹³⁷ The term journalist is primarily mentioned in Article 79, Protocol I,¹³⁸ which “purports to protect journalists engaged on dangerous missions from the harmful effects of armed conflict.”¹³⁹ Although, Protocol I does not define what is meant by “journalist,” it is interpreted broadly in accordance with its everyday meaning and includes “any correspondent, reporter, photographer, and their technical film, radio and television assistants who are ordinarily engaged in any of these activities as their principal occupation.”¹⁴⁰ It also encompasses DoD civilian members of military news agencies,¹⁴¹ but does not include any uniformed members assigned to Armed Forces Radio and Television Service.¹⁴² Moreover, a separate, but related category of media representatives includes war correspondents and freelance journalists.¹⁴³

War correspondents are defined as those civilian journalists “who accompany the armed forces without actually being members thereof.”¹⁴⁴ War correspondents are required to receive “authorization, from the armed forces which they accompany, who shall provide them for that purpose with an identity card.”¹⁴⁵ This military “authorization” sets them apart as accredited war correspondents.¹⁴⁶ This is in contrast to freelance journalists who are not accredited by the armed forces and are not entitled to the same protections as war correspondents.¹⁴⁷ Thus, the definition of journalist under Protocol I includes both war correspondents and freelance journalists, but only war correspondents are given additional protections under Geneva Convention III.¹⁴⁸ Because embedded journalists are considered accredited journalists who “accompany the armed forces,” they are also considered to be war correspondents for purposes of Geneva Convention protections.¹⁴⁹

B. Legal Status of Journalists

Journalists are afforded civilian status under Article 50(1) of Protocol I which generally defines civilians and the civilian population.¹⁵⁰ According to Article 79(1), Protocol I, “journalists engaged in dangerous professional missions in areas of armed conflict shall be considered as civilians within the meaning of Article 50, paragraph 1.”¹⁵¹ The fact that this provision

¹³⁷ HANS-PETER GASSER, THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 228–30 (Deiter Fleck ed., 1995).

¹³⁸ Protocol I, *supra* note 4, art. 79.

¹³⁹ CLAUDE PILLOUD ET AL., COMMENTARY OF THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 918 (Yves Sandoz et al. eds., 1987).

¹⁴⁰ *Id.* at 921 (quoting the definition contained in draft Article 2(a) of the International Convention for the Protection of Journalists Engaged in Dangerous Missions in Areas of Armed Conflict).

¹⁴¹ Article 79, Protocol I indirectly includes all civilians “accompanying the force” as defined in Article 4(A)(4) of Geneva Convention III. *Id.* at 921; GC III, *supra* note 3, art. 4(A)(4). Furthermore, paragraph 1, Article 50, Protocol I which defines civilians (also referred to in Article 79), includes persons defined in Article 4(A)(4) of Geneva Convention III as well. GC III, *supra* note 3, art. 4(A)(4); Protocol I, *supra* note 4, arts. 50, 79.

¹⁴² Turner & Norton, *supra* note 7, at 13 (quoting PILLOUD at 921).

¹⁴³ GASSER, *supra* note 137, at 228–29; see also Hans-Peter Gasser, *The Protection of Journalists Engaged in Dangerous Professional Missions*, 232 INT'L REV. OF THE RED CROSS 3 (Jan. 1, 1983).

¹⁴⁴ GC III, *supra* note 3, art. 4(A)(4); see generally JEAN PREUX ET AL., COMMENTARY OF THE THIRD GENEVA CONVENTIONS RELATIVE TO THE TREATMENT OF PRISONERS OF WAR OF 12 AUGUST 1949, at 44, 64–65 (Jean Pictet et al., 1960). “War correspondents” is also the terminology to describe journalists who worked military campaigns in the early years of modern journalism. See generally ROTH, *supra* note 14.

¹⁴⁵ GC III, *supra* note 3, art. 4(A)(4). War correspondents and freelance journalists, alike, are provided with identification cards. *Id.*; see also Protocol I, *supra* note 3, art. 79(3) (generally establishing the identity card requirements for all journalists). The identification card will designate whether the journalist is either accredited by the armed forces or not as a means of proving his or her status. GC III, *supra* note 3, art. 4(A)(4).

¹⁴⁶ The accreditation of war correspondents through the armed forces is distinct from any accreditation that may come from the news agency that employs them. Turner & Norton, *supra* note 7, at 14; see also PILLOUD ET AL., *supra* note 139, at 918 (discussing that journalists with special authorization to accompany the armed forces are considered accredited correspondents).

¹⁴⁷ Turner & Norton, *supra* note 7, at 14; PILLOUD ET AL., *supra* note 139, at 918, 920. See discussion *infra* Part III.C. (discussing the different protections afforded war correspondents will be discussed further herein).

¹⁴⁸ Article 4(A)(4) accords captured war correspondents the status of prisoner of war which is not provided to non-accredited journalists. PILLOUD ET AL., *supra* note 139, at 918.

¹⁴⁹ GC III, *supra* note 3, art. 4(A)(4).

¹⁵⁰ Article 50, paragraph 1 states that “a civilian is any person who does not belong to one of the categories of persons referred to in Article 4(A)(1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.” Protocol I, *supra* note 4, art. 50(1). Article 4(A)(4) specifically encompasses journalists as those civilian persons “who accompany the armed forces without being members thereof.” *Id.*; PILLOUD ET AL., *supra* note 139, at 920–21. Furthermore, Article 50, paragraph 2 speaks to the breadth of this civilian status by stating that “the civilian population comprises all persons who are civilians.” Protocol I, *supra* note 4, art. 50(2).

¹⁵¹ Protocol I, *supra* note 4, art. 79(1). Article 79, paragraph 1 relates back to Article 50 of Protocol I to incorporate journalists as civilians. PILLOUD ET AL., *supra* note 139, at 920–21. Thus, Article 50 essentially is the root authority for journalists being given civilian status. *Id.* This is in part because, Article 79

states that journalists are “considered as civilians,” and not that they “are civilians,” is of little significance.¹⁵² Because journalists are treated like civilians, they do not lose this status by their mere presence in an area of armed conflict while on a professional mission.¹⁵³ This status even extends under circumstances where journalists take advantage of military logistical support.¹⁵⁴ Regardless of whether journalists are non-accredited by the military or are “accompanying the armed force” as accredited war correspondents, they maintain their civilian status.¹⁵⁵

While the drafters contemplated giving journalists their own special status, they determined it was not in the best interest of the international community.¹⁵⁶ Instead, Article 79 instituted special provisions to accommodate the unique nature of journalists who perform their duties in the context of armed conflict.¹⁵⁷ One such provision is Protocol I’s requirement that journalists be issued a special identity card.¹⁵⁸ Similar to a Soldier’s uniform, it creates a presumption that the person is a journalist.¹⁵⁹ Overall, Article 79 contemplates that these “special rules are required for journalists who are imperiled by their professional duties in the context of armed conflicts” because, while they are civilians, they arguably encounter a higher level of danger than other civilian counterparts.¹⁶⁰ Nevertheless, these “special rules” primarily speak to the legal protections afforded journalists under differing circumstances and does not call into question their status as civilians.¹⁶¹

did not result from the original draft of Protocol I submitted to the Diplomatic Conference by the International Committee of the Red Cross (hereinafter ICRC) upon governmental expert consultation. Gasser, *supra* note 143, at 2–3. Instead, in 1970, the Human Rights Commission of the United Nations General Assembly was called upon to create a special draft convention to protect journalists on dangerous missions. *Id.*

¹⁵² PILLOUD ET AL., *supra* note 139, at 920. In dealing with this language issue, the Diplomatic Conference recognized that the language of Article 79(1) could be misconstrued as creating a separate status for journalists not “as civilians” but one “considered as civilians.” *Id.* (referencing the Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law (CDDH) applicable in Armed Conflicts, Geneva, 1974–1977). However, due to a compromise from all parties to the Working Group who drafted the provision, the CDDH did not wish to reopen the matter on such a finely balanced text. *Id.* Nevertheless, the “considered as civilians” language is universally treated “merely declaratory” and does not create a separate quasi-civilian status for journalists. *Id.*

¹⁵³ *Id.* at 920–21.

¹⁵⁴ In order to transmit information on the events during the conflict, journalists who accompany the military in combat arguably expose themselves to equivalent dangers experienced by the armed forces. *Id.* at 920. As such, journalists require logistical support such as transportation, lodging, food, access to communication networks and protection of the military in order to operate in such austere environments. *Id.* This type of military support does not violate the customary law of war principle on distinction. *Id.*

¹⁵⁵ *Id.* at 921. The distinction between the status and protections afforded journalists should not be confused. While all journalists, both accredited and non-accredited, are given civilian status, the sub-category of journalists known as “war correspondents” receive different protections than other journalists because they are accredited from the armed forces under Article 4(A)(1)(4). GC III, *supra* note 3, art. 4(A)(1)(4). Protections for journalists will be discussed later in this paper. See discussion *infra* Part III.C.

¹⁵⁶ Creating a special status is consistent with other humanitarian law efforts such as the 1949 Geneva Conventions and the 1977 Protocols which conferred special status to those assisting victims of conflict, to include: medical, religious, and civil defense staff personnel. Gasser, *supra* note 143, at 4. However, the prevailing view is that creating additional protections for non-victim assisting type groups (i.e. journalists) runs the risk of effectively diminishing the protection of the current specially protected personnel. *Id.*; see also PILLOUD ET AL., *supra* note 139, at 919 (making more protective groups could endanger the greater protections afforded the civilian population).

¹⁵⁷ Gasser, *supra* note 143, at 2 (providing an extensive analysis of the legislative history of Article 79 of Protocol I).

¹⁵⁸ Article 79, paragraph 3 states that journalists “shall be issued by the government of the State of which the journalist is a national or in whose territory he resides or in which the news medium employing him is located, shall attest to his status as a journalist.” Protocol I, *supra* note 4, art. 79(3). Each State establishes its own criteria for obtaining the card. PILLOUD ET AL., *supra* note 139, at 923–24. Upon issuance, the card does not create the status of the bearer, but only “attests to his status” in order to prove his status in the case of arrest or capture. *Id.*; PREUX ET AL., *supra* note 144, at 64–65. After issuance, there is no requirement that journalists carry the card and failure to carry the card does not revoke his or her status. PILLOUD ET AL., *supra* note 139, at 923–24; PREUX ET AL., *supra* note 144, at 64–65. The identity card, and the required information, is based on the model provided for identity cards for persons accompanying the armed force under Article 4(A)(4) of GC III. PILLOUD ET AL., *supra* note 139, at 923–24; GC III, *supra* note 3, art. 4(A)(4). Article 4(A)(4) of Geneva Convention III discusses identity card provisions related to war correspondents in the context of protective status. PILLOUD ET AL., *supra* note 139, at 923–24. Deriving its historical significance from Article 81 of the 1929 Convention, the Conference on Government Experts in drafting Geneva Convention III recognized that identity cards could be problematic for protective status as well. PREUX ET AL., *supra* note 144, at 64–65. Significant problems arose during World War II where persons who were entitled to POW status were not given such protections because they did not have their identity card at the point of capture. *Id.* Under the 1929 Convention, a qualifying person, such as one accompanying the armed forces, was only granted POW if they possessed the card. *Id.* As a result, the 1949 Diplomatic Conference changed this old provision into Article 4(A)(4) and determined that holding the identity card does not grant or create these POW rights, but only acts as evidence of their status. *Id.* Today, persons accompanying the armed forces are no longer required to have an identity card in their possession in order to get POW protective status. *Id.*

¹⁵⁹ Gasser, *supra* note 143, at 2.

¹⁶⁰ PILLOUD ET AL., *supra* note 139, at 918. Interestingly, while other civilians that “accompany the armed forces” such as government contractors are also exposed to dangers not encountered by other civilians, they do not have their own provision under Protocol I. See also Turner & Norton, *supra* note 7, at 3–20 (discussing that there are three primary groups of civilians encountered across the spectrum of conflict: DoD civilian employees, contractors, and non-affiliated civilians of which journalists other than war correspondents fit into). But see GC III, *supra* note 3, art. 4(A)(4) (giving protections to other groups).

¹⁶¹ PILLOUD ET AL., *supra* note 139, at 920–22.

C. Legal Protections for Journalists

According to Article 79(2) of Protocol I, journalists enjoy all the protections afforded civilians under the Geneva Conventions and Protocol I, assuming “they take no action adversely affecting their status as civilians.”¹⁶² Protocol I’s special provisions only extend to journalists in situations of international armed conflict.¹⁶³ These protections extend under two factual scenarios governed by law of armed conflict: those where journalists are directly exposed to dangers on the battlefield and situations where journalists fall into the hands of the enemy or upon capture during armed conflict.¹⁶⁴ Additionally, within the larger group of journalists, special protections are afforded war correspondents under the second scenario.¹⁶⁵ In the instance where journalists directly participate in hostilities, any protections generally afforded will be forfeited.¹⁶⁶

1. Protection from Attack

Journalists directly exposed to dangers on the battlefield are afforded all the protections given to civilians under the Geneva Conventions, Protocol I, and customary international law.¹⁶⁷ Article 51 of Protocol I is the primary authority that addresses what it means to “enjoy general protection against dangers arising from military operations.”¹⁶⁸ Essentially, to be a subject of this protection means not being the “object of attack.”¹⁶⁹ The basic rule is that belligerent parties to a conflict will “at all times distinguish between civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”¹⁷⁰ Similarly, while civilians cannot be specifically targeted as a military objective, they also cannot be the subject of indiscriminate attacks when there is no military objective.¹⁷¹ Because journalists are treated as civilians in armed conflicts, they are also subject to the immunity from such

¹⁶² Protocol I, *supra* note 4, art. 79(2). Apart from the rules for war correspondents authorized to accompany armed forces under Article 4(A)(4) of Geneva Convention III, only the 1977 Protocol I addresses protections for journalists or their mission in armed conflicts. PILLOUD ET AL., *supra* note 139, at 918. However, the concern for the special situation encountered by journalists on dangerous missions has an older legal tradition. *Id.*

Article 13 of the Hague Regulations Concerning the Laws and Customs of War on Land annexed to the Fourth Hague Convention of 1907 provided prisoner of war treatment to “individuals who follow[ed] an army without directly belonging to it, such as newspaper correspondents and reporters” when they were in possession of a certificate from the military authorities of the army they were accompanying. *Id.*; Gasser, *supra* note 143, at 2. This solution was also retained by the Geneva Convention III (Article 81). PILLOUD ET AL., *supra* note 139, at 918; Gasser, *supra* note 143, at 2. It was the above mentioned Geneva Convention III provision that provided war correspondents the status of prisoners of war when they accompany the armed forces. PILLOUD ET AL., *supra* note 139, at 918. The requirement for certification was dropped for the purposes of actually creating the status, but retained for identifying qualifying journalists for special protection. Gasser, *supra* note 143, at 2.

¹⁶³ Protocol I supplements the Geneva Conventions for the protection of war victims (Geneva Convention III) and only applies to common Article 2 situations, referring to international armed conflict. Protocol I, *supra* note 4, art. 1(3); GC III, *supra* note 3, art. 2.

¹⁶⁴ PILLOUD ET AL., *supra* note 139, at 922.

¹⁶⁵ GC III, *supra* note 3, art. 4(A)(4); Gasser, *supra* note 143, at 2.

¹⁶⁶ PILLOUD ET AL., *supra* note 139, at 922. Article 79, paragraph 2 uses the wording “no action adversely affecting their status as civilians” as equivalent language to indicate circumstances where a protected person took “direct part in hostilities” as referenced in Article 51, paragraph 3 (provision for protection of the civilian population). Protocol I, *supra* note 4, arts. 51(3), 79(2). See discussion *infra* Part III.D.2.

¹⁶⁷ The customary rule is that innocent civilians must be protected from combatant activities arising in hostilities. PILLOUD ET AL., *supra* note 139, at 615, 617, 922. The Hague Regulations annexed to Hague Convention IV of 1907 and the Fourth Geneva Convention of 1949 and other specific conventions addressing weapon types also address the need to protect civilians from hostilities. *Id.* at 617.

¹⁶⁸ Protocol I, *supra* note 4, art. 51(1).

¹⁶⁹ *Id.* art. 51(2). Article 51, paragraph 2’s use of the word attack is referencing Article 49 which provides the definition of attacks and scope of application. PILLOUD ET AL., *supra* note 139, at 618. It is interesting to point out that a deliberate attack on a civilian such as a journalist, causing death or injury, would constitute a serious breach of Protocol I to trigger a war crime under Article 85, para. 3(e). Protocol I, *supra* note 4, art. 85(3).

¹⁷⁰ Protocol I, *supra* note 4, art. 48. Article 48’s “Basic rule” essentially forms the foundation for much of the Geneva Convention tradition of the law of war and essentially codifies the customary law principle of discrimination or distinction by establishing that military attacks should be directed at combatants and not civilians or civilian property. PILLOUD ET AL., *supra* note 139, at 598–600.

¹⁷¹ Protocol I, *supra* note 4, art. 52(2). Under paragraph 2, the object of attack includes not only being directly targeted by a military act, but also a threat of violence where the purpose is to spread terror among the civilian population. *Id.* Under paragraph 4, indiscriminate attacks includes: those not directed at a specific military objective (i.e., targeting a civilian home with no military value); those employing a method or means of combat which cannot be directed at a specific military objective (i.e., military target acquired and destroyed by a long range rocket which also destroys civilian homes due to its notorious known for its shear inaccuracy, such as the V2 rocket in World War II); those employing a method or means of combat which cannot be limited as required by Protocol I (i.e., weapon system destroys military target, but also the civilian home because the wrong type of weapon system was chosen for the mission, such as the use of a precision guided weapon versus a more conventional bomb). *Id.* art. 52(4).

This paragraph was added as a result of military tactics, such as carpet bombing, used during World War II where entire cities were leveled for military advantage, instead of only the military targets within the cities. PILLOUD ET AL., *supra* note 139, at 619. Other prohibited methods of warfare conducted on

attacks prohibited under the laws of war.¹⁷² This immunity equally applies to all types of journalists working in the midst of hostilities without any required proof of their civilian status as a basis to receive this protection.¹⁷³

2. Protection at Capture

Journalists are protected by the Geneva Conventions when they fall into the hands of the enemy or upon capture.¹⁷⁴ The level of protection depends upon whether the journalist is accredited or non-accredited.¹⁷⁵ Article 79(2) distinguishes between the protections afforded journalists generally and those designated as war correspondents.¹⁷⁶ The language, “and without prejudice to the right of war correspondents accredited to the armed forces to the status provided for Article 4(A)(4) of the Third Convention” suggests that non-accredited journalists receive civilian protections, while military accredited journalists retain prisoner-of-war (POW) status under Geneva Convention III.¹⁷⁷ The interplay between Article 4(A)(4) of Geneva Convention III and Article 79(2) of Protocol I, makes it clear that the general reference to journalist, includes freelance journalists as non-accredited journalists, while the term war correspondent refers to accredited journalists.¹⁷⁸ As such, freelance journalists get civilian protections under Geneva Convention IV upon capture and war correspondents receive enhanced protections as POWs under Geneva Convention III.¹⁷⁹ Unlike other types of journalists, the law carves out a unique situation for war correspondents who maintain the status of civilians during conflict, but who are treated as POWs when captured by the enemy. Consequently, as accredited journalists, embedded media enjoy protections afforded to civilians and combatants alike because they “accompany the armed forces.”¹⁸⁰

civilians include using civilians to shield military objectives or shield, favor or impede military operations. Protocol I, *supra* note 4, art. 51(2), (4), (5), (6), (7). Article 52, paragraph 2 defines military objectives as: “those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time offers a definite military advantage.” *Id.* art. 52(2). Even attacks directed at military objectives are not permitted when the attack could incidentally result in loss of civilian injury, life, or property that would be “excessive in relation to the expected direct and specific military advantage.” *Id.* art. 51(5); *see also* PILLOUD ET AL., *supra* note 139, at 615–17; 630–34 (discussing the legislative history and meaning behind the provisions of Articles 51 and 52).

¹⁷² PILLOUD ET AL., *supra* note 139, at 920, 922.

¹⁷³ *Id.*; Gasser, *supra* note 143, at 6. The Diplomatic Conference considered whether the protections afforded journalists during armed conflict should be predicated upon the presence of some special protective sign worn by journalists during the performance of their duties on the battlefield. PILLOUD ET AL., *supra* note 139, at 919 (referencing the Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law (CDDH) applicable in Armed Conflicts, Geneva, 1974–1977). In fact, the Venezuelan delegation proposed that all journalists where a protective emblem clearly visible from a distance in the shape of a bright orange arm band with two black triangles. *Id.* at 919. *But cf.* Gasser, *supra* note 143, at 4 (recognizing that a proposal for a protective emblem was recommended, but suggesting that the emblem involve wearing an arm-band with a large black P on a golden disk instead of the orange emblem). The proposal was rejected because it would make journalists so conspicuous to combatants that it could unnecessarily escalate the danger of their mission by drawing fire rather than averting it. PILLOUD ET AL., *supra* note 139, at 919. Furthermore, there was concern the protective emblem might even endanger the surrounding civilian population. *Id.*

¹⁷⁴ Protocol I, *supra* note 4, art. 79(2); GC III, *supra* note 3, art. 4(A)(4); GC IV, *supra* note 6, art. 4.

¹⁷⁵ PILLOUD ET AL., *supra* note 139, at 922–23.

¹⁷⁶ Protocol I, *supra* note 4, art. 79(2).

¹⁷⁷ *Id.* The POW protections afforded war correspondents under Geneva Convention III are not affected by the 1977 Protocol I. PILLOUD ET AL., *supra* note 139, at 922–23. Article 79 acts as a cross-reference to the other articles which deal with civilian protections in general. *Id.* It should also be noted that these civilian protections are not dependent upon the nationality of the journalist or which State has accredited the journalist. Gasser, *supra* note 143, at 6. Thus, the journalist can maintain his civilian protective status regardless of whether he comes from a neutral State or one party to the conflict. *Id.*

¹⁷⁸ PILLOUD ET AL., *supra* note 139, at 923. Accredited journalists are called war correspondents under Article 4(A)(4). GC III, *supra* note 3, art. 4(A)(4). Article 79(2) recognizes that journalists are given civilian protections, but excepts out war correspondents by referring to Geneva Convention III for POW protections. Protocol I, *supra* note 4, art. 79(2). Freelance journalists would then fall into the civilian protection category instead of the POW provisions. PILLOUD ET AL., *supra* note 139, at 923.

¹⁷⁹ PILLOUD ET AL., *supra* note 139, at 923; *see also* GC III, *supra* note 3, art. 12–16 (providing the general protections for prisoners-of-war); GC IV, *supra* note 6, arts. 13–26 (providing the general protections for civilians).

¹⁸⁰ GC III, *supra* note 7, art. 4(A)(1), (A)(4). Combatants receive POW status protections under the same Article 4(A) provision in Geneva Convention III as do journalists who “accompany the armed forces,” but it is delineated in a separate paragraph to illustrate that there are distinct groups within Article 4(A). *Id.*

D. Loss of Legal Protections

Journalists are granted absolute immunity from military attack unless they either effectively lose their protective status¹⁸¹ or they actually lose their protective status by taking “action adversely affecting their status as civilians.”¹⁸² Any such type of loss endangers the journalist performing their mission because they can then be the object of a military attack.¹⁸³

1. Loss of *De Facto* Protective Status

Civilians, who risk losing their actual physical protection, but not their actual protective rights, are said to forfeit their *de facto* protections.¹⁸⁴ These situations commonly occur when civilians either closely follow a military unit engaged in action or remain too close to a military objective, as both can be legitimately targeted by the military for attack.¹⁸⁵ Similarly, if war correspondents wear military uniforms on the battlefield or rely upon military transportation,¹⁸⁶ they incur the same risk, because the enemy “combatant cannot be asked to spare an individual whom he cannot identify as a journalist.”¹⁸⁷ In these circumstances, the customary law of distinction would not be applicable where there is no evidence to indicate that civilians may be a target.¹⁸⁸ However, where the presence of a civilian is observed, the legitimacy of a military attack is guided by the customary law principle of proportionality.¹⁸⁹ Consequently, embedded journalists’ willingness to maintain close proximity to military operations and expose themselves to the same dangers as front-line battle units, frequently jeopardizes their *de facto* protective status as civilians.¹⁹⁰

2. Loss of Actual Protective Status

Three primary components of Protocol I establish the criteria by which journalists can lose their protective civilian status under the laws of war during international armed conflict. First, Article 79(2) establishes limits to the activities that

¹⁸¹ PILLOUD ET AL., *supra* note 139, at 922.

¹⁸² Protocol I, *supra* note 4, art. 79(2).

¹⁸³ *Id.* art. 51(3).

¹⁸⁴ PILLOUD ET AL., *supra* note 139, at 922; Gasser, *supra* note 143, at 6.

¹⁸⁵ PILLOUD ET AL., *supra* note 139, at 922; Gasser, *supra* note 143, at 6.

¹⁸⁶ The law of war principle of distinction, codified in Article 48 of Protocol I, does not prohibit those civilians who accompany the military in the field from wearing uniforms. Memorandum of Law, W. Hays Parks, Office of The Judge Advocate General, U.S. Army, subject: Law of War Status of Civilians Accompanying Military Forces in the Field (May 6, 1999) [hereinafter Law of War Memo] (on file with author). This rule applies to either the same military uniforms worn by combatants or another distinct uniform. *Id.* Uniforms are one way for commanders to ensure their force protection mission (i.e. maintain camouflage integrity or to readily establish who is authorized to be in a certain location). *Id.* The mere presence of the uniform does not, in itself, designate one as a combatant. *Id.* Similarly, the customary law of war principle of distinction does not prohibit civilians who accompany the armed forces from being transported by military tactical vehicle/aircraft during times of combat. *Id.* In fact, there is a long historical precedent for war correspondents wearing military uniforms or being transported on military tactical vehicles/aircraft in the field. See *supra* note 44; *see also* Turner & Norton, *supra* note 7, at 22–23 (discussing media members commonly wore military uniforms during Operation Desert Storm).

¹⁸⁷ PILLOUD ET AL., *supra* note 139, at 922. Even if the combatant identifies the individual as a protected person (i.e. journalist), if he targets a legitimate military objective, he is not required under Article 79 to cease fire because the journalist happens to be too close to the action. *Id.*

¹⁸⁸ Protocol I, *supra* note 4, art. 48.

¹⁸⁹ *Id.* art. 51(5)(b). The customary law principle of proportionality is codified in Article 51(5)(b). *Id.* Once a military objective exists, and either injury, death, or destruction could result to civilians or civilian property, the military objective can only be targeted where such “incidental loss of life or injury and collateral damage is [not] excessive in relation to the concrete and direct military advantage anticipated.” *Id.*; PILLOUD ET AL., *supra* note 139, at 623–26. In judging a commander’s actions, one must view it from the perspective of the commander, in light of all circumstances. U.S. DEP’T OF THE ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE para. 4 (July 1956) [hereinafter FM 27-10]. A military commander must act “reasonably” not only to ensure that the objectives are military objectives, but also to ensure that the damage to civilians or civilian property is not disproportionate to the military advantage anticipated. *Id.*; *see also* Parks, *supra* note 6, at 3 (discussing the history behind the Redulic Rule derived from *United States v. List* where a commander must act reasonably to ensure objectives are military in nature).

¹⁹⁰ The Committee to Protect Journalists (CPJ) and the Freedom Forum are regarded as the most reliable sources for tracking the death statistics of journalists. *CPJ Special Report—Analysis of Journalist Deaths*, Committee to Protect Journalists, Sept. 20, 2006, available at <http://www.newssafety.com>. A 2006 CPJ study of journalists’ deaths revealed that the second overall leading cause of death for journalists is crossfire in combat operations at 18%. *Id.* The leading cause is murder at 71%, with 24% of those murders resulting from government and military officials during the course of a military conflict. *Id.* As of 31 December 2008, 252 journalists have been killed covering the Iraq war since its inception. Assoc. Press Int’l, *Iraq Journalist Deaths Match Vietnam War Killed*, CHINA DAILY, May 31, 2006, available at <http://www.newssafety.com>. In comparison, 71 journalists died in the Vietnam War, 18 in the Korean War, and 67 in World War II. *Id.* In Vietnam, most journalists were killed in combat or military air crashes, or went missing, as compared to the Iraq War where many journalists have been presumably murdered due to their editorial activities. *Id.*

journalists may engage in.¹⁹¹ Journalists' protections are contingent upon them taking "no action adversely affecting their status as civilians."¹⁹² Second, this language is essentially referencing and is consistent with Article 51(3)'s provision that civilians who "take direct part in hostilities" will lose their protective status.¹⁹³ Lastly, Article 79(1) creates a requirement that journalists must be "engaged" in their "professional mission" in order for the protective status to apply.¹⁹⁴ As is the case with much of legal jurisprudence, it is the differing legal interpretations of these provisions that create difficulty in their practical application on the battlefield. Nonetheless, even in this controversial area,¹⁹⁵ there are some general guiding principles which all States recognize as the definitive status of the law.

a. Taking a Direct Part in Hostilities

According to Article 51(3), civilians lose their immunity "for such time as they take direct part in hostilities."¹⁹⁶ There are two primary components to analyzing this provision. First, one must determine what types of activities constitutes taking a "direct part in hostilities."¹⁹⁷ Second, one must establish the time period in which these qualifying activities take place for purposes of understanding the loss of civilian protections. This analysis specifically applies to civilian journalists by means of Article 79(2) which is inextricably tied to the meaning of Article 51(3).¹⁹⁸ When civilian journalists are said to be directly participating in hostilities they can be treated as "unlawful combatants"¹⁹⁹ and lose any afforded civilian protections, although not the actual status itself.²⁰⁰ Upon capture, they would be "regarded as marauders or bandits" and tried under domestic law of the adverse party for their actions.²⁰¹ Interestingly, it is arguable whether war correspondents and other persons accompanying the armed force, as opposed to non-accredited journalists, actually lose their protective status as prisoners-of-war when taking direct part in hostilities.²⁰² However, regardless of the outcome, the consequence of this scenario is severe for any civilian who takes a direct part in hostilities because they become legitimate military targets.²⁰³

¹⁹¹ Protocol I, *supra* note 4, art. 79(2).

¹⁹² *Id.*

¹⁹³ *Id.* art. 51(3).

¹⁹⁴ *Id.* art. 79(1).

¹⁹⁵ A series of three Expert Meetings were co-organized in The Hague (2 June 2003 and 25–26 October 2004) and Geneva (23–25 October 2005) by the ICRC and the TMC Asser Institute and designed to clarify the precise meaning of the notion of "direct participation in hostilities" under Article 51(3). *Direct Participation in Hostilities*, Int'l Comm. on the Red Cross, Dec. 31, 2005 [hereinafter Direct Participation ICRC], available at <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205?>. This terminology has never been defined in treaty law. *Id.* The importance of understanding this terminology has dramatically increased in parallel with the growing involvement of civilians in the conduct of hostilities in both international and non-international armed conflicts. *Id.* As of the beginning of 2009, the issue is still being addressed by approximately forty legal experts representing military, governmental, academic circles, as well as international and NGOs. *Id.*

¹⁹⁶ Protocol I, *supra* note 4, art. 51(3).

¹⁹⁷ *Id.*

¹⁹⁸ PILLOUD ET AL., *supra* note 139, at 922. Actions "adversely affecting" a journalist's status as a civilian mentioned in Article 79(2) equates to those situations where civilians take "a direct part in hostilities" under Article 51(3). *Id.*

¹⁹⁹ The term unlawful combatant is not a term recognized by the Geneva Conventions, Protocol I, or customary international law. *Pub. Comm. Against Torture in Israel v. Gov't of Israel*, HCJ 769/02 (2005) (stating that "[As] far as existing law goes, the data before us are not sufficient to recognize this third category [of unlawful combatant]. That is the case according to the current state of international law, both international treaty law and customary international law"). However the United States recognizes this term to create almost a separate status for those who are neither non-combatants nor combatants. *Ex parte Quirin*, 317 U.S. 1 (1942). In the context of this article, the term "unlawful combatant" means civilians who have lost their immunity due to taking direct part in hostilities, in violation of the laws of war.

²⁰⁰ PILLOUD ET AL., *supra* note 139, at 619.

²⁰¹ Non-accredited journalists acting as unlawful combatants would be subject to domestic law upon capture. *Id.* at 922–23. As mentioned above, the accredited journalist may be subject to either domestic law or POW protections dependent upon the capturing party's interpretation of the laws of war. LESLIE C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 105 (2d ed. 2000).

²⁰² Under Article 45 (Protection of Persons Who Have Taken Part in Hostilities), persons captured are presumed to have POW protections unless otherwise proven by a competent tribunal. Protocol I, *supra* note 4, art. 45. However, there is some question remaining as to whether or not the adverse party will still accord war correspondents, or other persons who accompany the armed forces, the same POW status they rightfully retained prior to becoming unlawful combatants. Article 45 appears to look to Articles 43 and 44 of Protocol I with the understanding that only combatants, specifically members of the armed forces, are entitled to the POW status upon capture, unless they forfeit these rights (i.e., determined to be spies). *Id.* Because this provision does not include an unlawful combatant category, it is unclear how an adverse party would treat war correspondents, or others accompanying the armed force, who took a direct part in hostilities. PILLOUD ET AL., *supra* note 139, at 546–59. They might be treated as POWs or tried under domestic law with loss of POW rights. *Id.*

²⁰³ PILLOUD ET AL., *supra* note 139, at 618.

While the international legal community widely acknowledges the existence of Article 51(3)'s basic components which can lead to the loss of the civilian protective status, agreement on how Article 51(3)'s language is defined and implemented is, for the most part, open to wide interpretation.²⁰⁴ The term "direct," is generally accepted as referring to participation in hostilities where "acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces."²⁰⁵ It is settled that these contemplated, direct acts may only be committed by combatants.²⁰⁶ There is little doubt that a journalist would be taking a direct part in hostilities if they took up arms, or in some other fashion attempted to capture, injure or kill the enemy forces, or damage or destroy enemy property.²⁰⁷ However, aside from direct-type acts, defining and implementing the direct participation notion has been a significant point of contention in recent years due to the "increased intermingling of civilian and military activities" as required by the surge in military technology, privatization of the armed forces, and the war on terrorism.²⁰⁸ In light of these developments, two primary theories have emerged on how Article 51(3)'s "direct part in hostilities" language is to be practically applied on the battlefield.

A majority of nations adhere to the traditional Protocol I approach of interpreting Article 51(3), while only a few countries, including the United States, hold fast to the functionality test.²⁰⁹ The Protocol I view espouses that only those acts by civilians which cause "actual harm" to personnel and equipment where there is a "direct causal relationship between the activity engaged in and the harm done to the enemy at the time and the place where the activity occurs," qualify as direct participation in hostilities.²¹⁰ Protocol I also distinguishes support of the war effort from direct participation in hostilities.²¹¹ It recognizes that there are numerous activities that either directly or indirectly make "a contribution to the war effort" such as participation in military transportation, weapons production, combat logistical support, and even morale of the general population.²¹² War effort functions are among the larger group of "direct support" activities which do not trigger the direct participation standard.²¹³ Due to this narrow interpretation of Article 51(3), the Protocol I approach offers the most protection for civilians accompanying the armed forces from being intentionally and lawfully targeted.

²⁰⁴ Direct Participation ICRC, *supra* note 195.

²⁰⁵ PILLOUD ET AL., *supra* note 139, at 619.

²⁰⁶ Only combatants "have the right to participate directly in hostilities" under the laws of war. Protocol I, *supra* note 4, art. 43(3). Combatants are distinguished from civilians and are largely viewed as individuals who "(1) are under the command of a person responsible for his subordinates and subject to an internal disciplinary system; (2) have fixed and distinctive emblem recognizable at a distance; (3) carry arms openly; and (4) conduct operations in accordance with the laws and customs of war." GC III, *supra* note 3, art. 4(A)(2); *Id.* arts. 43(1), 44.

²⁰⁷ PILLOUD ET AL., *supra* note 139, at 619. This rule equally applies to groups of journalists taking such action. *Id.*

²⁰⁸ Direct Participation ICRC, *supra* note 195. Today's military technology has incorporated what was more traditionally considered more civilian concepts such as computer network attack and information operations. *Id.*; see also Law of War Memo, *supra* note 186 (discussing the significance of military technology and privatization of the military as being the two major changes that has altered the traditional role of civilians accompanying the military); see generally Turner & Norton, *supra* note 7, at 1 (suggesting that more than at any time in military history, civilians have accompanied the armed forces to assist in combat support and combat service support missions).

²⁰⁹ 57TH GRADUATE COURSE DESKBOOK, INT'L & OPERATIONAL LAW, Vol. II, at C-7, C-8 (2008) [hereinafter DESKBOOK]. The Protocol I approach is generally referenced in the Commentary on Protocol I. PILLOUD ET AL., *supra* note 139, at 612, 618-19. The United States is the primary proponent of the functionality test, also referred to as the "direct part test." DESKBOOK, *supra*, at C-8. This theory is currently being taught to U.S. military Judge Advocates at the U.S. Army Judge Advocate General's Center and School in Charlottesville, Virginia. *Id.* The functionality test was largely discussed in preparation for a new joint services law of war manual initiated by the U.S. Department of Defense Law of War Working Group, in coordination with its counterparts in Australia, Canada, Denmark, Great Britain, Israel, New Zealand, and the United Kingdom during the 1990s. Law of War Memo, *supra* note 186. The DoD Law of War Working Group consisted of representatives from DoD General Counsel, Legal Counsel to the Chairman, Joint Chief of Staff and the Judge Advocates General of the Army, Navy, and Air Force and the Staff Judge Advocate to the Commandant of the Marine Corps. *Id.* The Working Group has not published the law of war manual and last reconvened at the U.S. Army's Judge Advocate General's Legal Center and School in May 2009. *Id.*

²¹⁰ PILLOUD ET AL., *supra* note 139, at 516.

²¹¹ *Id.* at 516, 619; A.P.V. ROGERS, LAW ON THE BATTLEFIELD 8 (1996).

²¹² PILLOUD ET AL., *supra* note 139, at 516. It is against customary international law to target the civilian population merely because they are generally participating in the war effort since this is required during war to various degrees. *Id.* Such activities might include: employment in munitions factories, participation in rationing efforts, expressions of support for enemy government and provision of purely administrative and logistical support to forces not deployed in combat. DESKBOOK, *supra* note 209, at C-8, C-9. The United States did not object to the "war effort" provision, but it did object to other provisions. U.S. State Dep't Remarks, *supra* note 4, at 428.

²¹³ PILLOUD ET AL., *supra* note 139, at 516, 619. "Direct support" type activities performed by civilians accompanying the force in combat might include: battlefield logistics, weapon systems maintenance, intelligence, and guarding activities. Direct Participation ICRC, *supra* note 195. Attempts to more clearly distinguish between civilians who contribute to the "war effort" and those who perform functions that allow "direct support" of military operations were rejected during the drafting of Protocol I due to the concern that a new category of civilians would be created, neither combatants nor civilians. Michael Bothe et al., *New Rules for Victims of Armed Conflicts*, HAGUE 260, 294 nn.1, 8 (1982) (citing 1 INT'L COMM. OF THE RED CROSS, CONF. OF GOV'T EXPERTS REPORT, para. 3, p. 1117, (1972)). Critics who support targeting civilians in "direct support" roles suggest that it improperly creates a quasi-combatant this is job function dependent. ROGERS, *supra* note 211, at 8-9, 132.

In contrast to the Protocol I view, the U.S. functionality test does not require actual harm to the enemy in order for a civilian to constitute taking a direct part in hostilities.²¹⁴ Instead, it seeks to expand the Protocol I approach to circumstances based upon the importance and level of functions carried out by civilians on the battlefield.²¹⁵ While it does not condone targeting civilians for general participation in the war effort, similar to Protocol I, it may allow civilians to be lawfully targeted for their “direct support” in combat operations.²¹⁶ There is less importance placed on the causal connection to harm in favor of evaluating the importance or function of the civilian’s contribution to the enemy’s military effort.²¹⁷ As a result, under this U.S. approach, “there is no clear point at which it may be said that a civilian accompanying the armed force in the field may be at risk from intentional attack.”²¹⁸

In comparison to the restrictive Protocol I theory, practical application of the U.S. functionality test allows for a broad range of activities which could divest civilians of their immunity from intentional targeting during “direct support” scenarios.²¹⁹ A civilian who is “supplying base amenities such as trash collection, housekeeping or water” will retain their civilian protections, while a “civilian entering the theater of operations in support or operation of sensitive, high value equipment, such as a weapon system” may be subject to attack due to the importance of his/her duties.²²⁰ This approach not only views the issue “from the standpoint of the individual, but also how an enemy might view that person, and whether it is likely an attacker could be prosecuted successfully for the attack if captured following the attack.”²²¹ Civilians, who hide behind their immunity, when in actuality their duties directly support combat operations, are in jeopardy of being the object of attack.²²² As one prominent law of war attorney endorsing this viewpoint put it, “the work of some civilians has become so critical to military success that those individuals are civilians in name and garb only.”²²³ In other words, “war essential civilians working on a U.S. military base during a time of [international armed conflict] would be subject to direct attack”²²⁴ under the functionality test. This permissive theory makes it conceivable that journalists who are in direct support of modern military operations could lose their immunity like other civilians accompanying the force.

²¹⁴ Law of War Memo, *supra* note 186.

²¹⁵ *Id.* This test also considers geographical and remoteness in time considerations as part of its analysis. *Id.*

²¹⁶ *Id.*; *see also* Direct Participation ICRC, *supra* note 195 (recognizing that some States extend the Protocol I view that taking a “direct part in hostilities” not only includes activities involving the delivery of violence, but also acts which would be considered in direct support of military operations).

²¹⁷ Law of War Memo, *supra* note 186.

²¹⁸ *Id.*

²¹⁹ Civilians, who directly support the war effort through combatant-like activities such as logistical support for combat forces, or intelligence gathering, lose their civilian protections and become lawful targets. Parks, *supra* note 6, at 132.

²²⁰ Law of War Memo, *supra* note 186. The DoD guidance on the employment of military and civilian contractors should not be confused with the U.S. functionality test analysis. *Id.* Instead, it should be viewed as an application of the Protocol I analysis. *Id.* Thus, the U.S. can still conceivably target the enemy’s civilian contractor under the functionality test. *Id.* *But see* U.S. DEP’T OF DEFENSE, INSTR. 1100.22,

GUIDANCE FOR DETERMINING WORKFORCE MIX para. E2.1.3.3.2 (7 Sept. 2006) (providing that technical advice on the operation of a weapon system, or other support of a non-discretionary nature performed in direct support of combat operations, is not taking a direct part in hostilities).

²²¹ Law of War Memo, *supra* note 186.

²²² *See* discussion *supra* note 89 (targeting of the Serbian civilian RTS television station during the Kosovo War for direct support activities); *id.* (targeting of al-Jazeera (civilian) satellite television station being used as an “instrument of war” against allies during Afghanistan War).

²²³ Parks, *supra* note 6. W. Hays Parks is currently the Senior Associate Deputy General Counsel, International Affairs, U.S. DoD and is a major advocate of the U.S. functionality test and well respected law of war expert. *Id.* He served as the Special Assistant to the The Judge Advocate General of the U.S. Army for law of war matters from 1979 to 2003. *Id.* He is a member of the DoD Law of War Working Group currently working on developing a new joint services law of war manual which will discuss, in part, the U.S. functionality test. Law of War Memo, *supra* note 186.

²²⁴ Parks, *supra* note 6, at 134 (citing letter from DAJA-IA to Counselor for Defense Research and Engineering (Economics), Embassy of the Federal Republic of Germany (Jan. 22, 1988)); *see also* U.S. DEP’T OF AIR FORCE, PAM. 10-231, FEDERAL CIVILIAN DEPLOYMENT GUIDE, para. 6.3.3 (Apr. 1, 1999) (stating that civilians performing “duties directly supporting military operations may be subject to direct, intentional attack”). Interpretation of the Air Force policy on targeting “direct support” activities is unclear when read in conjunction with other Air Force memoranda which shift the analysis from functional proximity to physical proximity in combat. ANNOTATED SUPPLEMENT TO THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS 484 n.14 (A.R. Thomas & James C. Duncan eds., Supp. 1999) (defining direct support as “support by civilians to those actually participating in battle or directly supporting battle action, and military work done by civilians in the midst of an ongoing engagement.”) Similar to Air Force policy, the Navy has also published additional documents with unclear guidance on the issue of direct support).

b. Timing of Protections

Similar to the direct participation language, there is ample legal debate about how long civilians lose their protective status when they take a direct part in hostilities.²²⁵ Article 51(3) states that “civilians shall enjoy the protection . . . unless and for such time as” they participate in hostilities.²²⁶ At a general level, both the Protocol I test and the U.S. functionality test recognize that civilians only lose their immunity for as long as they directly participate in the hostilities and then regain their protections upon their ceasing the prohibited activity.²²⁷ However, these theories diverge in their analysis as to when civilians cease participation in hostilities because of how they determine what types of activity triggers a loss of protections under Article 51(3).

Because the Protocol I theory requires actual harm to result in order to constitute direct participation in hostilities, immunity is only lost when the harm occurs and is restored upon completion of the hostile act.²²⁸ In contrast, the functionality approach considers what type of activity is being performed and cessation is dependent upon the specific function performed by the civilian, regardless of when the actual harm ensues.²²⁹ Under a scenario where a civilian plans an attack on the enemy, then later executes the attack, the U.S. approach would allow the civilian to be a lawful target at the planning stage and continue until the attack is executed.²³⁰ Even if an attack did not occur, but intelligence confirms that the civilian’s function qualifies as a legal target under the U.S. analysis, the civilian can be intentionally attacked.²³¹ However, the Protocol I approach would only allow the civilian to be lawfully targeted during the actual attack itself.²³² Thus, the U.S. approach to the “as for such time” element arguably allows for a much greater period of time for the loss of civilian immunity than the Protocol I view, albeit on a case-by-case basis.

c. Journalists Engaged in Dangerous Professional Missions

Whether journalists are “engaged in a dangerous professional mission in areas of armed conflict”²³³ is a critical, but often overlooked component in determining the protective status of journalists on the battlefield. Indeed, the *reason d’être* of Article 79 is to recognize only those journalists who are actually performing their “professional mission” in armed conflict, because of the incredible dangers they encounter while accompanying the military which can be lawfully targeted.²³⁴

According to the Commentary on Article 79, the concept of a “professional mission” covers all activities which normally form part of the journalist’s profession in a broad sense: being on the spot, doing interviews, taking notes, taking photographs or films, sound recording, and transmitting them to his newspaper or agency.”²³⁵ Such activities do not result in the loss of immunity against direct attacks and do not constitute a direct participation in hostilities.²³⁶ Thus, journalists who are taking notes of operational activities, photographing enemy positions, and then transmitting this information are not

²²⁵ This article will not extensively address timing considerations under Article 51(3).

²²⁶ Protocol I, *supra* note 4, art. 51(3). The U.S. approach also adopts the “for such time” component of the Protocol I test. Law of War Memo, *supra* note 186; DESKBOOK, *supra* note 209, at C-8.

²²⁷ PILLOUD ET AL., *supra* note 139, at 619; GREEN, *supra* note 202, at 102; GASSER, *supra* note 137, at 233.

²²⁸ PILLOUD ET AL., *supra* note 139, at 619.

²²⁹ The importance or function of the civilian’s contribution to the enemy’s military effort is critical to the U.S. functionality test. Law of War Memo, *supra* note 186.

²³⁰ *Id.*; DESKBOOK, *supra* note 209, at C-8.

²³¹ This approach is heavily dependent upon gathering intelligence to determine the importance and level of a civilian’s function and contribution to the military effort. Law of War Memo, *supra* note 186. As long as intelligence confirms that a civilian is taking “a direct part in hostilities,” the civilian can remain a lawful target. *Id.*; see discussion *supra* note 98 (using NATO intelligence to target civilian media television station during Afghanistan War). It can be difficult to determine the duration for which a civilian can be legally targeted under the U.S. test. DESKBOOK, *supra* note 209, at C-8.

²³² Immunity is regained upon cessation of the attack, even if the civilian may later become involved in another conflict. PILLOUD ET AL., *supra* note 139, at 619.

²³³ Protocol I, *supra* note 4, art. 79(1). The “areas of armed conflict” language is not necessarily a legal qualifier as to the civilian protections afforded journalists, since they would enjoy the right as civilians in and out of armed conflict. PILLOUD ET AL., *supra* note 139, at 921.

²³⁴ Protocol I, *supra* note 4, art. 79(1); PILLOUD ET AL., *supra* note 139, at 918.

²³⁵ PILLOUD ET AL., *supra* note 139, at 921.

²³⁶ Knut Dörmann, *International Humanitarian Law and the Protection of Media Professionals Working in Armed Conflicts*, Int’l Comm. on the Red Cross, Jan. 12, 2007, available at <http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/media-protection-article-?>.

treated as spies subject to prosecution by the enemy's domestic laws as any other civilian might be, but instead, are "respected and protected."²³⁷ This level of respect for the journalist's professional mission is taken to an even higher level of significance when one considers that war correspondents receive enhanced POW protections beyond those civilians who do not accompany the military into combat.²³⁸

To the extent that war correspondents are no longer engaged in their professional mission, their POW protections would appear to be forfeited.²³⁹ What types of activities fall outside of the "professional mission" of journalists is not clearly addressed by Article 79.²⁴⁰ On one end of the spectrum, a journalist who takes an action causing direct harm towards the enemy would lose protections and could be lawfully targeted.²⁴¹ In direct contrast, a war correspondent who merely suspends their usual professional activities would likewise lose their POW protections, but could not be lawfully attacked. However, Article 79 does not contemplate the scenario where journalists use their professional skills to directly support military operations against the enemy. Defining what journalistic activities constitute taking a direct part in hostilities requires a practical application of Article 79 on a case-by-case basis.

d. Interplay Between Article 79(1) and Article 51(3)

Journalists cannot be lawfully targeted unless their activities are outside the protections provided in Article 79(1)²⁴² and they rise to the level of taking "a direct part in hostilities" under Article 51(3).²⁴³ Whether the activity triggers Article 51(3) is dependent upon the activity and the interpretation of Article 51(3)'s language. While the Protocol I approach is more restrictive in its interpretation of Article 51(3)'s language, the U.S. functionality test is more permissive.²⁴⁴ Both interpretations recognize that activities causing actual harm to the enemy make the actor a lawful target.²⁴⁵ However, the U.S. functionality test permits journalists to be lawfully attacked where their activities are directly supporting a significant military mission against the enemy.²⁴⁶ Journalists who are not "engaged in dangerous professional missions" would be conducting activities that jeopardize their protective status under the meaning of Article 79(1).²⁴⁷ While not all activities falling outside of Article 79(1)'s meaning would necessarily make journalists lawful targets,²⁴⁸ direct support actions under the U.S. test could qualify.²⁴⁹ Determining what types of direct support activities result in this outcome requires a methodology to evaluate these activities based upon the particular circumstances of each individual case.

²³⁷ Respecting journalists on the battlefield who are not taking direct part in hostilities is a customary rule under the laws of war. J.M. Henckaerts, Study on Customary International Humanitarian Law, Annex. List of Customary Rules of International Humanitarian Law, 87 INT'L REV. OF THE RED CROSS, No. 857, at 201 (Mar. 2005); Gasser, *supra* note 143, at 3–18; see generally Jane Hall, *A 'Most Searing Experience': Bob Simon Relives His 40 Days as Iraq's Hostage During the Gulf War in New Book*, L.A. TIMES, May 11, 1992, at F12C.1 (CBS reporter Bob Simon and three other reporters, who were wearing battle dress uniforms (BDUs) and acting as freelance journalists, were captured and initially viewed as spies by the Iraqis in Operation Desert Storm for crossing the Iraqi border in the early stages of the war).

²³⁸ GC III, *supra* note 3, art. 4(A)(4). It is important to note that aside from protections, the prevailing view is that civilians cannot lose their civilian status because one is either a combatant or a non-combatant under the Geneva Conventions. PILLOUD ET AL., *supra* note 139, at 610–12. However, the U.S. perspective is that civilians can become unlawful combatants dependent upon the circumstances. *Ex parte Quirin*, 317 U.S. 1 (1942).

²³⁹ Non-accredited journalists who no longer perform their professional mission will always maintain their civilian protections, unless of course they take direct part in hostilities. See discussion *supra* Part III.C.2.a. Accredited journalists who no longer perform their professional mission and no longer accompany the armed forces would then be treated similarly to non-accredited journalists who are now no longer obliged to have POW status and are given civilian protections unless they take direct part in hostilities. *Id.* However, accredited journalists who are not performing their mission, and who then remain accompanying the military as civilians might be viewed to be in violation of the laws of war, as either some quasi-form of the military force or an unlawful combatant perhaps. *Id.* Seemingly, their POW protections would not apply because they no longer qualify to accompany the military in their professional capacity since they are not performing their mission. *Id.*

²⁴⁰ Protocol I, *supra* note 4, art. 79(1).

²⁴¹ *Id.* art. 51(3).

²⁴² *Id.* art. 79(1).

²⁴³ *Id.* art. 51(3).

²⁴⁴ See discussion *supra* Part III.D.2.a.

²⁴⁵ See *id.*

²⁴⁶ Law of War Memo, *supra* note 186; DESKBOOK, *supra* note 209, at C-8. It appears that the U.S. functionality test was employed during the selected targeting of civilian media during the Kosovo and Afghanistan Wars. See *supra* notes 89, 98 and accompanying text.

²⁴⁷ Protocol I, *supra* note 4, art. 79(1).

²⁴⁸ It is foreseeable that a war correspondent may not be conducting their professional mission and would lose their POW status, but would remain a protected civilian assuming they were not taking a direct part in hostilities. PILLOUD ET AL., *supra* note 139, at 922.

²⁴⁹ Law of War Memo, *supra* note 186.

IV. Evaluating the Embedded Journalist's Activities under Article 79(1)

Under the U.S. functionality test to Article 51(3), embedded journalists are not “engaged in dangerous professional missions”²⁵⁰ in the meaning of Article 79(1) if their journalistic activities directly support military operations.²⁵¹ Defining the level of direct support required to make an embedded journalist a lawful target requires a methodology to recognize when such circumstances are apparent. Critical to this analysis is the general concept of military integration coupled with the specifics of the journalist’s job function.²⁵² Enhanced military-press relations, increased levels of technology, and privatization are major factors in the decision to integrate the press in current military operations.²⁵³ However, these factors are extremely broad and do not clearly illustrate when an embedded journalist’s activities may trigger the loss of protections under the U.S. functionality test to Article 51(3).²⁵⁴ To help clarify when an embedded journalist’s activities will result in a loss of protections, this paper recommends three criteria to aid in this evaluation: (1) the integration of war correspondents into military information operations, (2) the eroding distinction between PAO and war correspondents, and (3) the loss of reporter objectivity on the battlefield.²⁵⁵

A. Integration of War Correspondents into the Overall Information Operations Mission

The degree to which embedded journalists are used to directly support military Information Operations (IO)²⁵⁶ presents the single, greatest risk of creating a scenario where journalists could lose their protections and be lawfully targeted under the application of the U.S. functionality test to Article 51(3).²⁵⁷ Information Operations serves an important military function in combat operations by using integrated capabilities²⁵⁸ to “influence, disrupt, corrupt, or usurp adversarial human and automated decision making while protecting our own.”²⁵⁹ The integrated nature of the embedded press system, combined with this military function, dramatically increases the likelihood that a journalist’s activities will be defined as directly supporting combat operations.²⁶⁰ Specifically, psychological operations (PSYOP), operations security (OPSEC), and public

²⁵⁰ Protocol I, *supra* note 4, art. 79(1).

²⁵¹ Law of War Memo, *supra* note 186. There is no question that journalists who perform their professional mission under Article 79 are given civilian protective status. Protocol I, *supra* note 4, art. 79(1). Thus, it would appear that every professional activity they perform is protected. However, this paper asserts that some professional activities are being used to directly support military operations instead of the journalist’s mission.

²⁵² Law of War Memo, *supra* note 186. The author contents that the greater the level of integration of the embedded press system into the military fabric, the less distinguishable the civilian journalist’s role becomes from the military mission.

²⁵³ PAUL & KIM, *supra* note 15; *see also* Direct Participation ICRC, *supra* note 195 (discussing the challenges of high-tech warfare and privatization of the armed forces in implementing the notion of direct participation in hostilities under Article 51(3)).

²⁵⁴ Protocol I, *supra* note 4, art. 51(3); Law of War Memo, *supra* note 186.

²⁵⁵ Each proposed factor is designed to be evaluated in the context of other factors and does not necessarily offer a mutually exclusive answer as to whether a certain embedded journalist’s activities make him a lawful target. The weight that should be given to any particular factor is dependent upon the circumstances of the individual war correspondent.

²⁵⁶ JOINT PUB. 3-13, *supra* note 2.

²⁵⁷ Law of War Memo, *supra* note 186; *see* DESKBOOK, *supra* note 209, Vol. III, at C-21 (discussing that civilians taking a direct part in information operations become unlawful enemy combatants under the U.S. approach to Article 51(3)); *see also* Michael N. Schmitt, *Wired Warfare: Computer Network Attack and Jus in Bello*, 846 INT’L REV. OF THE RED CROSS 365, 381(2002) (suggesting that IO operations can be targeted where it causes injury, death, damage, or destruction under *jus in bello* principles of the laws of war). Some scholars argue that open media information is a more important dimension of IO than issues such as cyber attack. Porch, *supra* note 17, at 101–02. This is a potentially dangerous development in media-military relations because it has “led enthusiasts to view information as a commodity to be manipulated for operational advantage.” *Id.*

²⁵⁸ Information Operations is designed to provide joint force commanders (JFCs) and their staffs with the ability to achieve information superiority in strategic military missions by harnessing an array of core, supporting, and related capabilities. JOINT PUB. 3-13, *supra* note 2, at x, xi. IO core capabilities consist of psychological operations (PSYOP), military deception (MILDEC), operations security (OPSEC), computer network operations (CNO), and electronic warfare (EW). *Id.* at x. Information Operations supporting capabilities which are either directly or indirectly involved in the information environment include: information assurance (IA), physical security, physical attack, counterintelligence, and combat camera. *Id.* The related capabilities of PA, civil-military operations (CMO), and defense support to public diplomacy must always be coordinated and integrated with core and supporting IO capabilities. *Id.*

²⁵⁹ *Id.* at ix.

²⁶⁰ Today’s war correspondents invariably come into natural, frequent contact with IO functions in a variety of meaningful ways. *See generally* PAUL & KIM, *supra* note 15 (providing numerous examples where the embedded press system has been incorporated into the overall IO mission to combat enemy propaganda or gain public trust in the military’s mission).

affairs are the most logical IO capabilities where a war correspondent's skill set can be used by the military to create higher levels of embedded press involvement.²⁶¹

War correspondents play a significant role in PSYOP.²⁶² Elements of PSYOP can be employed at the strategic, operational, and tactic levels and is "the only DOD asset given the authority to influence foreign target audiences (TA) directly through the use of radio, print, and other media."²⁶³ The importance of this mission during combat operations cannot be underestimated.²⁶⁴ During hostilities, PSYOP is designed to reduce the adversary's will to fight, create dissidence and disaffection within their ranks, and ultimately induce surrender.²⁶⁵ Embedded journalists can be employed at any level, and during any point during armed conflict, by using their professional skills and work product to directly support this military function.²⁶⁶ If this occurs, the use of their professional activities will take them outside the protections of Article 79, and expose them to direct attack from the enemy.²⁶⁷

Embedded journalists, who are informed components of the OPSEC process, run the risk of becoming part of the greater IO mission.²⁶⁸ The OPSEC process is continuous and denies adversary intelligence systems the critical information needed to correctly assess friendly capabilities and intentions.²⁶⁹ Although the military and press institutions have diametrically opposed goals with respect to OPSEC issues,²⁷⁰ embedded journalists are largely captive audiences who comply with OPSEC due to military control.²⁷¹ Commanders have the ability to put reasonable conditions on access to areas of hostilities, credentialing, and/or censor information solely for the purpose of OPSEC.²⁷² As such, war correspondents actively

²⁶¹ Embedded journalist involvement in PA operations will be discussed separately. *See* discussion *infra* Part IV.B. Involvement of journalists in MILDEC will not be addressed in this paper, except to state that journalists whose reporting activities are used as deceptive informational tools may be viewed as directly supporting this military mission and lose their protective status under a U.S. functionality test analysis. JOINT CHIEFS OF STAFF, JOINT PUB. 3-13.4, MILITARY DECEPTION, at ix (13 July 2006) [hereinafter JOINT PUB. 3-13.4]; *see also* PAUL & KIM, *supra* note 15, at 131 (suggesting that the use of the press in deception-based IO is dangerous because the long-term risks associated with damaging the press' credibility and military/press relations outweighs any short-term military strategic advantage).

²⁶² PAUL & KIM, *supra* note 15, at 25, 131.

²⁶³ JOINT CHIEFS OF STAFF, JOINT PUB. 3-53, DOCTRINE FOR JOINT PSYCHOLOGICAL OPERATIONS , at ix–x, xii (5 Sept. 2003) [hereinafter JOINT PUB. 3-53]. PSYOP are planned operations to convey selected truthful information to foreign audiences in order to affect the behavior of targeted individuals, groups, and even governments. *Id.* at ix. The greater PSYOP mission appears to be one of providing propaganda to thwart the enemy's objectives, even if it is provided through means of selected truthful information. However, the PSYOP doctrine only employs the term propaganda when referring to the enemy's propaganda campaigns, not PSYOP activities. *Id.* at I-5. Joint publication 3-53 defines propaganda as "any form of communication in support of national objectives designed to influence the opinions, emotions, attitudes, or behavior of any group in order to benefit the sponsor, either directly or indirectly. *Id.* at GL-7. Ironically, this is almost the exact definition provided in JP 3-53's overview section defining PSYOP, although the word propaganda is not used. *Id.* at ix.

²⁶⁴ During the First Gulf War, the Coalition successfully used its own radio network called "Voice of the Gulf" to counter Iraqi propaganda and disinformation as well as to encourage Iraqi defection and surrender. PERSIAN GULF WAR REPORT, *supra* note 16.

²⁶⁵ JOINT PUB. 3-53, *supra* note 263, at ix. In advance of hostilities, PSYOP can be used to "gather critical information, undermine a potential opponent's will or capacity to wage war, or enhance the capabilities of multinational forces." *Id.* at xiii.

²⁶⁶ Tactical PSYOP presents the most realistic entry point for embedded journalist involvement because they are routinely attached to combat units at this level. *See supra* notes 106–11 and accompanying text. Nevertheless, a journalist's work product can be used to facilitate the PSYOP mission at any juncture. *Id.* There is also a recent push to use war correspondents more extensively in future counter-propaganda campaigns than have been used in the past. PAUL & KIM, *supra* note 15, at 25 (discussing further integration of the embedded press into IO as mentioned in JOHN R. MACARTHUR & BEN H. BAGDIKIAN, SECOND FRONT: CENSORSHIP AND PROPAGANDA IN THE GULF WAR (1992)). In order to measure the success of embedded press involvement in IO, some have suggested this can be done through a content analysis of news coverage focused on news reports that "debunk" enemy claims in support of IO. *Id.* at 131. Nevertheless, to date, there are no existing data bases which provide research on the extent to which press coverage has supported IO during combat operations. *Id.*

²⁶⁷ Protocol I, *supra* note 4, arts. 51(3), 79(1). Some scholars fear that in the future, "an enemy missile could home on a reporter's signal" because their journalistic activities could be viewed as providing significant operational support. Porch, *supra* note 17, at 103.

²⁶⁸ PAUL & KIM, *supra* note 15, at 68–70. War correspondents have historically come into contact with differing OPSEC strategies such as credentialing, censorship, and "security at the source" throughout combat operations. *Id.*; *see supra* notes 28, 32, 45, 47, 66, 73, 79, 104, 133 and accompanying text.

²⁶⁹ JOINT CHIEFS OF STAFF, JOINT PUB. 3-13.3, OPERATIONS SECURITY, at vii, x (29 June 2006) [hereinafter JOINT PUB. 3-13.3]. OPSEC is an operations function, not a security function. *Id.* at x. "OPSEC considers the integration, coordination, deconfliction, and synchronization of all multinational information activities within the JFC's operational area." *Id.* at III-3.

²⁷⁰ *See* PAUL & KIM, *supra* note 15, at 15–16, 21–22 (explaining that the press' goal is to gain as much access as possible to newsworthy information to provide it to the public, while the military has an interest in not allowing news coverage which will compromise operational security); *see infra*, App. A.

²⁷¹ The commander has a major interest in protecting generally unclassified evidence that is associated with sensitive operations and activities. JOINT PUB. 3-13.3, *supra* note 269, at vii, x.

²⁷² *See generally* JOINT PUB. 3-61, *supra* note 2. War correspondents can be restricted from access to combat locations or other information. *Id.* at III-2; U.S. DEP'T OF ARMY, FIELD MANUAL 3-61.1, PUBLIC AFFAIRS TACTICS, TECHNIQUES AND PROCEDURES Ch. 4 (1 Oct. 2000) [hereinafter FM 3-61.1].

participate in OPSEC otherwise their reporting privileges can be revoked.²⁷³ At higher military levels, the control and influence of embedded journalists will usually be coordinated through the Joint Information Bureau (JIB).²⁷⁴ At the tactical unit level, the PAO assesses the quality and type of the media coverage and coordinates OPSEC measures intended to minimize the possible effects of negative media coverage.²⁷⁵ Because embedded journalists are more integrated into today's overall military IO mission,²⁷⁶ as compared to freelance journalists, they are more susceptible to military control over their reporting activities.²⁷⁷ These circumstances, in turn, can be used to directly support military operations.

Overall, IO seeks to use war correspondent news coverage to support positive public relations, build public support, and support successful information operations against the enemy.²⁷⁸ The more a journalist's professional mission is integrated into the IO mission, the greater the potential for their activities to be used to directly support this military combat capability, and ultimately jeopardize their special protective status under Article 79.²⁷⁹

B. Eroding Distinction between PAOs and War Correspondents

An eroding distinction between the use and role of the PAO²⁸⁰ and that of the war correspondent during combat operations, jeopardizes the protective status of embedded journalists.²⁸¹ The mission of public affairs is to "counter[] adversary propaganda and disinformation by providing a continuous flow of credible, reliable, timely, and accurate information to military members, their families, the media, and the public."²⁸² This mission is closely linked to overall IO goals and the two must be carefully coordinated to ensure consistent themes and messages are communicated.²⁸³ In this manner, public affairs is designed to "help defeat adversary efforts to diminish national will, degrade morale, and turn world opinion against friendly operations."²⁸⁴ Public Affairs' target audience is the American public, international public, the

²⁷³ JOINT PUB. 3-61, *supra* note 2, at III-25; *see also* PAUL & KIM, *supra* note 15, at 123–25 (providing methods on how to measure operational security violations committed by reporters during combat).

²⁷⁴ JOINT PUB. 3-61, *supra* note 2, at x. Joint Publication 3-61 states, "The JIB director, with supporting JIB staff, is responsible for coordinating all media operations within the operational area, and provides and coordinates support to the JFC through the joint force PAO. The JFC, with the assistance of the joint force PAO and the JIB director, directs the PA program in a manner that most efficiently contributes to the overall success of the command." *Id.*

²⁷⁵ *Id.* Public Affairs issues related to embedded journalists will be discussed later. *See* discussion *infra* Part IV.B.

²⁷⁶ *See* discussion *supra* Part II (providing historical accounts of the use of embedded journalism in combat).

²⁷⁷ The PAO can more easily control embedded journalists who are a daily part of the tactical unit as opposed to controlling the activities of freelance reporting and open-source media through traditional media coordination mechanisms such as the media pool and general media clearance procedures. JOINT PUB. 3-13.3, *supra* note 269, at III-3. In fact, embedded journalist control is evidenced by one of the criticisms of this press system, namely that unilateral reporters are treated as "second class citizens" in the combat theatre. PAUL & KIM, *supra* note 15, at 111. Freelance journalists simply were not given nearly the level of access as war correspondents during the Iraq War, and were thus not nearly as controlled by the military. *Id.* The effects of incorporating embedded journalists into the day-to-day unit activities will be discussed later. *See* discussion *infra* Part IV.C.

²⁷⁸ PAUL & KIM, *supra* note 15, at 23–24.

²⁷⁹ Protocol I, *supra* note 4, art. 79.

²⁸⁰ Because PAO's are military members they are considered combatants who can be lawfully targeted based upon their status. *Id.* art. 43(2); GC III, *supra* note 3, art. 4(A)(1). However, journalists are considered civilians, not combatants and cannot be targeted due to their status unless their conduct is in violation of Article 51(3). Protocol I, *supra* note 4, arts. 51(3), 79(2); GC III, *supra* note 3, art. 4(A)(4).

²⁸¹ Furthermore, some scholars have argued that during war "public information is a battle space" that must be controlled like any other. Porch, *supra* note 17, at 101–02; *see also* *supra* note 88 and accompanying discussion. Even the defense community has argued that treating information as a "battle space" could have negative repercussions when mixing public affairs with information operations. Porch, *supra* note 17, at 102. "Treating information as a battle space confuses operational success with strategic victory." *Id.*

²⁸² JOINT PUB. 3-61, *supra* note 2, at I-3, I-4. It is critical to provide factual, complete, and truthful information (even if the information concerns military's mistakes), in order to discredit and undermine adversary propaganda. *Id.* at I-4. Public affairs's mission is also designed to complement the DoD media principles of information. *Id.* at I-5; *see also* DoD 5122.5, *supra* note 72.

²⁸³ Careful PA and IO coordination prevents information fratricide. JOINT PUB. 3-13, *supra* note 2, at x; JOINT PUB. 3-61, *supra* note 2, at I-3 to I-4. Public Affairs is also linked to IO through close coordination with the OPSEC mission. JOINT PUB. 3-13.3, *supra* note 269, at III-3; JOINT PUB. 3-61, *supra* note 2, at III-21 to III-22, III-28. "PA activities [also] affect, and are affected by, PSYOP, and are planned and executed in coordination with PSYOP planning and operations." JOINT PUB. 3-61, *supra* note 2, at III-21.

²⁸⁴ JOINT PUB. 3-61, *supra* note 2, at I-4. This goal is accomplished by "putting accurate, complete information out first so that friendly forces gain the initiative and remain the preferred source of information." *Id.* at I-4. The mission to counter adversary propaganda is arguably a higher level operational support activity directly affecting combat operations than fostering the public trust at large or increasing the morale of military families back home. Promoting public morale would not likely be seen as a "direct support" threat, but "participation in the war effort" under both the Protocol I and U.S. functionality approach to Article 51(3). PILLOUD ET AL., *supra* note 139, at 619; Law of War Memo, *supra* note 186. Historically, PA has been effectively used to accomplish the greater IO counter-propaganda mission. JOINT PUB. 3-61, *supra* note 2, at I-5. In October 1994, Iraq dispatched 20,000 Republican

internal military information program, and adversary forces.²⁸⁵ The embedded press system is used to reach these target audiences.²⁸⁶ It is a key component of public affairs' media planning operations because it provides a more in-depth reporting tool than other media systems.²⁸⁷ Ironically, aside from the carrying of arms, public affairs' vision for war correspondents at the tactical level is essentially the same professional mission accomplished by military journalists.²⁸⁸ The integrated use of embedded journalists as a primary tool in accomplishing the public affairs mission eliminates distinctions between the roles of war correspondents and military journalists. This threatens the protective status of embedded journalists to the degree their activities are in concert with PAO's objectives and directly support the military's operational mission.²⁸⁹

C. Loss of Reporter Objectivity on the Battlefield

*George Bush is the President, he makes the decisions, and, you know, as just one American, he wants me to line up, just tell me where.*²⁹⁰

The loss of reporter objectivity by embedded journalists on the battlefield is one factor that poses a direct threat to their protective status.²⁹¹ This loss is directly proportional to the extent to which war correspondents are integrated into combat units and maintain their level of professionalism.²⁹² Patriotic journalism is also a major contributing factor to the loss of objectivity.²⁹³ The closer war correspondents remain to combat units and the less professional they are in maintaining their neutrality, the greater the risk that their professional activities can be used to directly support military operations.²⁹⁴ Ironically, both the military and press have created this potential for the loss of objectivity through their mutual interest in promoting better public relations.²⁹⁵ In order to tell the story of the combat Soldier, Sailor, Airman, Marine, and Coast Guardsman it is implicit that journalists closely identify themselves with these servicemembers to bring the "real" story to the general public.²⁹⁶ During this process, the inherent nature of the embedded system²⁹⁷ creates both the potential to provide

Guard troops to join 50,000 regular army troops on the Kuwaiti border. *Id.* at I-5. The U.S. use of media is largely credited with the Iraqi forces standing down from their threatening position within ten days of the deployment. *Id.*

²⁸⁵ JOINT PUB. 3-61, *supra* note 2, at I-7, I-8.

²⁸⁶ *Id.* at III-12. In this regard, embedded journalists and PA have similar objectives of providing truthful information to the public. PAUL & KIM, *supra* note 15, at 14-15.

²⁸⁷ JOINT PUB. 3-61, *supra* note 2, at III-12 to III-13. Public affairs doctrine establishes embedded journalism as the primary method for media planning. *Id.* at III-12 to III-13, III-24. In fact, PA doctrine specifically states that media pools are not the preferred means of covering U.S. operations. *Id.* at III-26. One drawback to the embedded system is the fact that it provides deep, detailed reporting instead of a broader perspective of combat operations. Cf. PAUL & KIM, *supra* note 15, at 111-12.

²⁸⁸ Civilian media accompanying the force are subject to the same release criteria for reporting and appear to have no mentionable distinction under the PA doctrine. JOINT PUB. 3-61, *supra* note 2, at II-6, III-12. In fact, some information that is releasable to Combat Camera (COMCAM) is prohibited to civilian journalists and military journalists alike, even though COMCAM personnel are military members like military journalists and have a role in PA. *Id.* at III-13. There also appears to be little doctrinal difference between civilian PAOs who accompany the force and war correspondents. *Id.* at II-2; see also Jason Flanagan, *Training Military Journalists Strains Fort Meade's Barracks*, EXAMINER, June 3, 2008, available at http://www.examiner.com/a-1421272-Training_military_journalists_strains_Fort_Meade_s_barracks.html (discussing the modern role of military journalists).

²⁸⁹ See discussion *supra* Part III.D.2.d.

²⁹⁰ J. Rutenberg & Bill Carter, *Draping Newscasts with the Flag*, N.Y. TIMES, Sept. 20, 2001, at C8 (quoting CBS television anchor Dan Rather during a telecast following the September 11th terrorist attacks).

²⁹¹ See also PAUL & KIM, *supra* note 15, at 112 (suggesting that the loss of objectivity also threatens the sanctity of the overall media mission to provide impartial coverage of events).

²⁹² "Journalists can protect themselves from identifying too closely with their assigned units by relying on their professionalism." *Id.* at 112-13.

²⁹³ "American reporters exhibit as much patriotism as members of the armed forces." AUOKOFER & LAWRENCE, *supra* note 47, at 3. Reporters throughout the history of U.S. conflicts have been patriotic, "especially when it comes to not impairing our own military." *Id.* (quoting JOHN J. FIALKA, HOTEL WARRIORS 5, 37 (1991)); see also Porch, *supra* note 17, at 103-04 (providing accounts where the media became "cheerleaders" for the military and reflected a mood of patriotism rather than remaining impartial to events in the Iraq War).

²⁹⁴ PAUL & KIM, *supra* note 15, at 112. The psychological phenomenon known as the "Stockholm syndrome" is used to illustrate the type of scenario where embedded journalists can lose their objectivity and could potentially directly support military operations. *Id.* Originally, this syndrome was designed to explain circumstances where hostages who are in direct conflict with their captors end up identifying with, excusing, and protecting their captors. *Id.* Some researchers believe that the pressures experienced by hostages that result in this behavior, are similar to the pressures embedded journalists encounter when they lose their objectivity during combat operations. *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Id.* One outward sign that journalists are too close to the unit members they accompany is their frequent use of the plural pronouns "we," "us," and "our" in their news stories to describe the progress of the units to whom they are attached. Shafer, *supra* note 102.

unprecedented levels of combat media coverage²⁹⁸ and an environment where reporters can lose their objectivity and become virtual extensions of the military's IO campaign.²⁹⁹

V. Conclusion

In light of the U.S. functionality test to Article 51(3), the role and use of today's embedded journalist in international armed conflicts poses a direct threat to their civilian protections under Article 79 of Protocol I. Despite the fact that embedded journalism has helped to facilitate better military-press relations and generally enhance news coverage of military conflicts, its increased level of integration in U.S. combat operations approaches the legal threshold of making the journalists themselves lawful targets. It is the U.S. military's responsibility to create new measures to ensure embedded journalists' activities are not so comingled with information operations that they become targeted. The overall integration of war correspondents into information operations, the eroding distinction between PAO and war correspondents and the loss of reporter objectivity on the battlefield are all factors that provide significant evidence that today's embedded journalists are probably not engaged in their "professional mission" within the meaning of Article 79. Embedded journalists are no longer performing their professional mission when they are in fact being used to directly support military information operations. To the extent this continues in U.S. military combat operations, war correspondents can be lawfully targeted by the enemy under the U.S. functionality test to Article 51(3).

²⁹⁷ Embedded coverage provides deep and detailed coverage of the events from the perspective of war correspondents that travel with single units to which they are assigned. PAUL & KIM, *supra* note 15, at 111-12. This type of news coverage is referred to as a "soda straw" view of combat operations. *Id.* The media can overcome this type of myopic reporting by assigning numerous embedded journalists to other units to provide a bigger news picture. *Id.* Nevertheless, despite the affect the "soda straw" view has on the quality of overall news coverage, the myopic nature of the embedded press system also creates the potential for war correspondents to lose their objectivity due to their complete integration into the unit.

²⁹⁸ The embedded press system has been hailed as a "win-win proposition" for both the military and press to foster better public relations and public demand for information. *Id.* at 110.

²⁹⁹ *Id.* at 110, 112-13 (discussing that the loss of objectivity is a shortcoming of the embedded process); see discussion *supra* Part IV.A (discussing the integration of the war correspondent into IO). "There's an inherent conflict built into embedding. From the military's point of view, when you embed somebody in your unit, they become family. For the reporter, that's very tricky. You want to keep objective distance from your source." Shafer, *supra* note 13 (quoting *Los Angeles Times* reporter Sam Howe Verhovek about conducting embedded journalism during Operation Iraqi Freedom); see also Porch, *supra* note 17, at 101-02. One journalist has even argued that the term "embed" intimates that the reporter is "in bed" with the military due to the lack of journalistic impartiality and neutrality exhibited by some war correspondents during combat operations. PAUL & KIM, *supra* note 15, at 112 (quote from PROJECT FOR EXCELLENCE IN JOURNALISM, *Embedded Reporters: What Are Americans Getting?*, (2003), available at <http://www.journalism.org>).

Appendix A

Comparison of Press and Military Missions and Goals³⁰⁰

Press	Military
Mission	
Reporting	Protection and defense of the United States
Mission-Related Goals	
Uphold obligations to the public <u>Achieve profits</u>	Achieve operational success Maintain operational security
Organizational Attributes	
Horizontal/competitive Reflexive Reactive Professional	Hierarchical/cooperative Reflexive Reactive and Proactive Professional
Goals for News Coverage	
Gain access to newsworthy information Provide newsworthy information to the public Fulfill obligations to the public Build market share Maintain quality of news Objectivity (tell both sides of the story) Accuracy <u>Credibility</u>	Do not allow news coverage to compromise operational security Fulfill legal obligations regarding press access Use news coverage to support military mission Obtain good public relations Build credibility Support information operations

³⁰⁰ PAUL & KIM, *supra* note 15, at xv.

Appendix B

DoDD 5122.05, September 5, 2008

ENCLOSURE 3

STATEMENT OF DoD PRINCIPLES FOR NEWS MEDIA COVERAGE OF DoD OPERATIONS³⁰¹

1. Open and independent reporting shall be the principal means of coverage of U.S. military operations.
2. Media pools (limited number of news media who represent a larger number of news media organizations for news gatherings and sharing of material during a specified activity) are not to serve as the standard means of covering U.S. military operations. However, they sometimes may provide the only means of early access to a military operation. In this case, media pools should be as large as possible and disbanded at the earliest opportunity (in 24 to 36 hours, when possible). The arrival of early-access media pools shall not cancel the principle of independent coverage for journalists already in the area.
3. Even under conditions of open coverage, pools may be applicable for specific events, such as those at extremely remote locations or where space is limited.
4. Journalists in a combat zone shall be credentialed by the U.S. military and shall be required to abide by a clear set of military security ground rules that protect U.S. Armed Forces and their operations. Violation of the ground rules may result in suspension of credentials and expulsion from the combat zone of the journalist involved. News organizations shall make their best efforts to assign experienced journalists to combat operations and to make them familiar with U.S. military operations.
5. Journalists shall be provided access to all major military units. Special operations restrictions may limit access in some cases.
6. Military PA officers should act as liaisons, but should not interfere with the reporting process.
7. Under conditions of open coverage, field commanders should be instructed to permit journalists to ride on military vehicles and aircraft when possible. The military shall be responsible for the transportation of pools.
8. Consistent with its capabilities, the military shall supply PA officers with facilities to enable timely, secure, compatible transmission of pool material and shall make those facilities available, when possible, for filing independent coverage. If Government facilities are unavailable,

ENCLOSURE 3

³⁰¹ DoDD 5122.05, *supra* note 72, at 9.

journalists, as always, shall file by any other means available. The military shall not ban communications systems operated by news organizations, but electromagnetic operational security in battlefield situations may require limited restrictions on the use of such systems.

9. Those principles in paragraph 8 shall apply as well to the operations of the standing DoD National Media Pool system.

ENCLOSURE 3

Appendix C

Major Access and Security Strategies During Significant Combat Actions³⁰²

Operations

Variables	Grenada	Panama	1st Gulf War	Somalia	Bosnia	Iraq
Estimated number of reporters	600	800	1600	600	22 embeds in 15 units	2200 (over 600 embeds)
Access strategy						
Access denial	Y	Y	Y/N	N	N	N
Press pools	Y	Y	Y	Y	N	N
Embedded press	N	N	N	N	Y	Y
Unilateral journalism	N	Y	Y	Y	Y	Y
Security Strategy						
Credentials	Y	Y	Y	Y	Y	Y
Security reviews	N	N	Y	N	N	N

RAND MG200-4.2

³⁰² PAUL & KIM, *supra* note 15, at 73.

Measuring “Other Transaction” Authority Performance Versus Traditional Contracting Performance: A Missing Link to Further Acquisition Reform

Major Gregory J. Fike*

Just one area that I wanted to mention that I think consumed a lot of our conversation on procurement was the issue of cost overruns in the Defense Department . . . [Y]our helicopter is now going to cost as much as Air Force One . . . [M]ost importantly, we have to make some tough decisions—you, Mr. President, have to make some tough decisions about not only what we procure, but how we procure it . . .¹

—Senator John McCain

[T]his is going to be one of our highest priorities . . . The helicopter I have now seems perfectly adequate to me. (Laughter.) Of course, I've never had a helicopter before—(laughter)—maybe I've been deprived and I didn't know it. (Laughter.) But I think it is a—it is a—an example of the procurement process gone amuck. And we're going to have to fix it.²

—President Barack Obama

I. Introduction

In 1986, the Packard Commission³ blamed an “increasingly bureaucratic and over-regulated” acquisition process for weapons systems costing too much, taking too long to develop, and incorporating obsolete technology by the time they are fielded.⁴ Research studies conducted in the late 1980s and 1990s confirmed the Packard Commission’s findings and suggested that Department of Defense (DoD) contractors incur substantial increased costs to comply with DoD-specific procurement statutes and regulations.⁵ In response, DoD engaged in acquisition reform initiatives which focused on making the defense acquisition process “faster, better, and cheaper.”⁶ Other transaction (OT) authority for the development of

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¹ Press Release, White House Office of the Press Sec'y, Remarks by the President in Question and Answer Session at the Closing of the Fiscal Responsibility Summit (Feb. 23, 2009) [hereinafter Fiscal Summit Press Release] (statement of Sen. John McCain), available at http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-in-QandA-session-at-closing-of-Fiscal-Responsibility-Summ/.

² *Id.* (President Obama’s response to Sen. McCain).

³ Formally known as the Blue Ribbon Commission on Defense Management, the Packard Commission was established by President Reagan with Executive Order 12,526 on July 15, 1985. Exec. Order No. 12,526, 50 Fed. Reg. 29,203 (July 18, 1985). The primary objective of the Commission was to “study defense management policies and procedures, including the budget process, the procurement system, legislative oversight, and the organizational and operational arrangements” *Id.* § 2(b). David Packard, co-founder of the Hewlett-Packard Company and former U.S. Deputy Secretary of Defense from 1969 to 1971, chaired the Commission. Biography of David Packard, <http://www.hp.com/hpinfo/execteam/bios/packard.html> (last visited June 30, 2009). Membership on the Commission included many prominent individuals in the defense acquisition industry including Jacques Gansler, former Under Secretary of Defense (Acquisition Technology and Logistics) and more recently the chairman of the Commission on Army Acquisition and Program Management in Expeditionary Operations. See COMMISSION ON ARMY ACQUISITION AND PROGRAM MANAGEMENT IN EXPEDITIONARY OPERATIONS, URGENT REFORM REQUIRED: ARMY EXPEDITIONARY CONTRACTING (2007), available at http://www.army.mil/docs/Gansler_Commission_Report_Final_071031.pdf.

⁴ PRESIDENT’S BLUE RIBBON COMM’N ON DEFENSE MANAGEMENT, A QUEST FOR EXCELLENCE: FINAL REPORT TO THE PRESIDENT BY THE PRESIDENT’S BLUE RIBBON COMMISSION ON DEFENSE MANAGEMENT 44 (1986) [hereinafter PACKARD COMMISSION REPORT], available at <http://www.ndu.edu/library/pbrc/36ex2.pdf>.

⁵ See generally JEFFREY A. DREZNER ET AL., RAND NATIONAL DEF. RESEARCH INST., MEASURING THE STATUTORY AND REGULATORY CONSTRAINTS ON DOD ACQUISITION: RESEARCH DESIGN FOR AN EMPIRICAL STUDY, TR-347-OSD, at 9 (2006) [hereinafter RAND MEASURING REGULATORY CONSTRAINTS: RESEARCH DESIGN], available at http://www.rand.org/pubs/technical_reports/TR347/ (referencing twelve studies from 1986 to 1997 that identified a “DoD regulatory cost premium” to comply with DoD-specific statutes and regulations).

⁶ CHRISTOPHER H. HANKS ET AL., RAND ARROYO CENTER, REEXAMINING MILITARY ACQUISITION REFORM: ARE WE THERE YET?, MG-291-A, at 1 (2005) available at <http://www.rand.org/pubs/monographs/MG291/>. This RAND Corporation study identified a non exhaustive list of sixty-three different acquisition reform initiatives that DoD introduced in the 1990s and into the twenty-first century. *Id.* at 10. “The list includes broad-based initiatives with wide-ranging effects (e.g., Commercial Item Procurements, Best-Value Contracting, Single Process Initiative, Evolutionary Acquisition, Logistics Transformation”). *Id.* at 9; see e.g., Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355; 108 Stat. 3243 [hereinafter FASA] (establishing preference for the purchase of commercial items to satisfy DoD requirements).

prototype programs was one of the reform initiatives specifically targeted to alleviate the burden of contractor compliance with DoD-unique requirements.⁷

Other transactions for prototype projects (OT-PPs)⁸ are unique in that they are generally not required to comply with the Federal Acquisition Regulation (FAR), its supplements, or other acquisition regulations.⁹ Therefore, OT-PPs offer DoD the opportunity for substantial cost savings in the form of reduced contractor compliance costs.¹⁰ Unfortunately, while Congress provided the Defense Advanced Research Projects Agency (DARPA) with OT-PP authority in 1994,¹¹ and the rest of DoD with OT-PP authority in 1997,¹² there still has not been a proper evaluation of OT-PP authority performance in comparison to traditional contracting methods.¹³ At a time when DoD's "procurement process has gone amuck"¹⁴ and "tough decisions [must be made] about not only what we procure, but how we procure it,"¹⁵ OT-PPs may offer the President and Congress a cost-effective alternative to traditional government procurement. However, the DoD requires useful metrics that evaluate the relative performance of OT-PPs versus traditional contracting methods so that the President and Congress can decide if expansion of OT-PPs into other areas of DoD procurement would be valuable.

This article first discusses the legislative history of DoD's OT authority. Next the article provides an overview of the acquisition reforms that took place in the mid 1990s. Special emphasis is placed on a 1994 DoD procurement cost study conducted by Coopers & Lybrand in association with The Analytic Sciences Corporation, Inc. (TASC), which estimated that on average DoD specific acquisition regulations cause an eighteen percent cost increase in DoD acquisition programs.¹⁶ The article then discusses the Government Accountability Office (GAO) criticism of DoD's failure to establish meaningful performance metrics for OT-PPs.¹⁷ The inherent difficulties the DoD encountered in establishing relevant performance

⁷ The term "other transaction" refers to the authority contained in 10 U.S.C. § 2371 for the military to "enter into transactions (other than contracts, cooperative agreements, and grants) . . ." 10 U.S.C. § 2371(a) (2006). The DoD uses "other transactions" for a variety of purposes, one of which is to enter into assistance-type relationships with commercial firms and consortia for government-sponsored research projects. See U.S. GEN. ACCOUNTING OFFICE, GAO/NSIAD-96-11, DOD RESEARCH: ACQUIRING RESEARCH BY NONTRADITIONAL MEANS (1996). However, as used in this article "other transactions" and the term "OT authority" refers to the 10 U.S.C. § 2371 authority as implemented by Section 845 of the National Defense Authorization Act for Fiscal Year 1994 to "carry out prototype projects directly relevant to weapons or weapon systems proposed to be acquired or developed by the DOD." National Defense Authorization Act for Fiscal Year 1994, Pub. L. No 103-160, § 844, 107 Stat. 1547, 1721 (1993) [hereinafter NDAA 1994].

⁸ Different naming conventions and acronyms are used to reference other transactions for prototypes. See, e.g., U.S. GEN. ACCOUNTING OFFICE, GAO/NSIAD-00-33, ACQUISITION REFORM: DOD'S GUIDANCE ON USING SECTION 845 AGREEMENTS COULD BE IMPROVED (2000) [hereinafter GAO/NSIAD-00-33] (using "Section 845 agreements" in place of other transactions for prototype projects). In order to avoid any confusion with different types of "other transactions" conducted under authority of 10 U.S.C. § 2371, the acronym OT-PP has been adopted throughout this article. See Thomas C. Modeszto, *The Department of Defense's Section 845 Authority: An Exception for Prototypes or a Prototype for a Revised Government Procurement System?*, 34 PUB. CONT. L. J. 211, 218 (2005) (abbreviating "other transactions for prototype project" with OT-PP).

⁹ See OFFICE OF THE UNDER SEC'Y OF DEF. FOR ACQUISITION, TECH. AND LOGISTICS, "OTHER TRANSACTIONS" (OT) GUIDE FOR PROTOTYPE PROJECTS 8 (2001) [hereinafter OT GUIDE], available at <http://www.acq.osd.mil/dpap/Docs/policy/otherTransactions/current%otguideconformed%20Jan%202001.doc>. Appendix 1 of the OT Guide provides a non-exhaustive list of twenty-one statutes inapplicable to other transactions. *Id.* app. I. The list includes the Competition in Contracting Act, Public Law 98-369 (1984), Contract Disputes Act, Public Law. 95-563 (1987), and the Buy American Act, 41 U.S.C. 10a-d (2006). *Id.* ("To the extent that a particular requirement is a funding or program requirement or is not tied to the type of instrument use, it would generally apply to an OT, e.g., fiscal and property laws."); see also Richard N. Kuyath, *The Untapped Potential of the Department of Defense's "Other Transaction" Authority*, 24 PUB. CONT. L.J. 521, 537 (1995) (stating that Title VI of the Civil Rights Act of 1964, Pub. L. No 88-352, §§ 601-605 (1964) is one example of a statute that is applicable to "other transactions").

¹⁰ See COOPERS & LYBRAND WITH THE ANALYTIC SCIENCES CORPORATION, INC., THE DOD REGULATORY COST PREMIUM: A QUANTITATIVE ASSESSMENT, DTIC Accession No. 295799, at 12 (1994) [hereinafter COOPERS STUDY], available at <http://handle.dtic.mil/100.2/ADA295799> (identifying cost savings ranging from 5 to 200%).

¹¹ See NDAA 1994, *supra* note 7, § 845(a).

¹² See National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, § 804(a), 110 Stat. 2422, 2605 (1996) [hereinafter NDAA 1997] (amending Section 845(a) of the NDAA 1994, *supra* note 7). Section 845(a) of the NDAA 1994 permitted the DARPA under the authority of 10 U.S.C. § 2371, to "carry out prototype projects that are directly relevant to weapons or weapon systems proposed to be acquired or developed by the Department of Defense." NDAA 1994, *supra* note 7, § 845(a). Section 804 of the 1997 National Defense Authorization Act amended Section 845 of the 1994 National Defense Authorization Act to expand the authority to carry out other transactions for prototype projects beyond DARPA to include "the Secretary of a military department, or any other official designated by the Secretary of Defense." NDAA 1997, *supra*, § 804(a).

¹³ See GILES SMITH ET AL., RAND NAT'L DEF. RESEARCH INST., ASSESSING THE USE OF "OTHER TRANSACTIONS" AUTHORITY FOR PROTOTYPE PROJECTS (DOCUMENTED BRIEFING), (2002) [hereinafter RAND 2002 OT STUDY], available at http://rand.org/pubs/document_briefings/2005/DB375.pdf. The RAND 2002 OT Study was unable to "perform a statistical comparison of a group of OT programs versus a group of conventional programs because there are too many variables and too few programs." *Id.* at 9. The 2002 RAND OT Study examined twenty-one of the seventy-two prototype programs that started during the 1994 to 1998 time period but most of the OT programs in the study were "just under way" so RAND did not have any true outcomes. *Id.* at 7.

¹⁴ Fiscal Summit Press Release, *supra* note 1 (quoting President Barack Obama).

¹⁵ *Id.* (quoting Sen. John McCain).

¹⁶ See COOPERS STUDY, *supra* note 10, at 12.

¹⁷ See generally GAO/NSIAD-00-33, *supra* note 8.

metrics for OT-PPs are highlighted.¹⁸ Lastly, this article provides recommendations for metrics that the DoD can use to measure the performance of OT-PPs versus traditional contracting methods.

II. History of Department of Defense “Other Transaction” Authority

A. The Defense Advanced Research Projects Agency Receives “Other Transaction” Authority

The origins of DoD’s OT-PP authority can be traced to DARPA. The Defense Advanced Research Projects Agency was established on 7 February 1958 as a separate agency under the DoD for the direction and performance of certain advanced research projects.¹⁹ The original charter, DoD Directive 5105.15, granted DARPA authority to enter into “contracts and agreements with individuals, private business entities, educational, research of scientific institutions.”²⁰ However, in the 1980s a shift in technology development leadership from the government sector to the private sector began to occur.²¹ The Defense Advanced Research Projects Agency discovered that cutting edge technology companies were reluctant to enter into any contracts with them out of fear that the restrictive intellectual property provisions of the Bayh-Dole Act²² would undermine the companies’ intellectual property rights.²³ Additionally, DARPA discovered that innovative commercial companies did not follow FAR cost accounting standards, which were required to perform cost-reimbursement research and development agreements.²⁴

In response to the restrictive Bayh-Dole Act and FAR provisions, various groups lobbied Congress for additional authority so that DARPA could contract with the “best and brightest companies in the research community.”²⁵ Specifically, these groups wanted Congress to authorize DARPA’s use of a contracting vehicle known as “other transactions” which had previously only been available to the National Aeronautical and Space Administration (NASA) under the National Aeronautics and Space Act of 1958 (Space Act).²⁶ The Space Act created NASA and granted them broad authority to enter into “contracts, leases, cooperative agreements, or other transactions as may be necessary in the conduct of its work.”²⁷

As a result, Congress granted DARPA the authority to enter into OTs for “carrying out basic, applied, and advanced research projects” for a two year period in 1989.²⁸ In 1991, DARPA’s authority to enter into OTs was codified in 10 U.S.C. § 2371 and expanded to include the “Secretary of each military department.”²⁹ However, the 1991 authority was somewhat limited because it only authorized OTs for “advanced research projects” and did not include authority to purchase tangible articles or prototypes.³⁰ It wasn’t until the passage of the National Defense Authorization Act (NDAA) for Fiscal Year (FY)

¹⁸ See RAND 2002 OT STUDY, *supra* note 13.

¹⁹ See U.S. DEP’T OF DEFENSE, DIR. 5105.15, DEPARTMENT OF DEFENSE ADVANCED RESEARCH PROJECTS AGENCY (7 Feb. 1958), available at http://www.darpa.mil/Docs/DARPA_Original_Directive_1958_200807180942212.pdf.

²⁰ *Id.* § II.C.3.

²¹ See generally Todd T. Hanson, *An Analysis of Other Transactions: Have Other Transactions Met the Intent of Congress?* 7-35 (June 2005) (unpublished M.S. thesis, Naval Postgraduate School) (on file with Naval Postgraduate School Library), available at <http://handle.dtic.mil/100.2/ADA435518> (providing a historical summary DoD research and development from the 1950s to the late 1990s).

²² Bayh-Dole Act, ch. 38, Pub. L. No. 96-517, 94 Stat. 3015, 3019 (1980) (codified at 35 U.S.C. §§ 200-212 (2006)).

²³ Joseph Summerill, *Homeland Security’s (Not So) Secret Weapon*, CONT. MGMT., Nov. 2002, at 35.

[W]hen a contractor receives funds . . . the government must receive a non-exclusive, non-transferable, irrevocable, paid-up license to practice . . . on behalf of the U.S. government, any invention that results from the government funding agreement. Further, the act’s reporting requirements often prevented companies from using trade secrets protection and the “march-in rights” allowed the government to “march in” and require a contractor to grant a nonexclusive license to another entity.

Id.; see 35 U.S.C. § 202 (2006).

²⁴ Kuyath, *supra* note 9, at 526.

²⁵ *Id.* at 528.

²⁶ Summerill, *supra* note 23.

²⁷ National Aeronautics and Space Act of 1958, Pub. L. No. 85-568, 72 Stat. 426 (codified as amended at 42 U.S.C. § 2473(c)(5) (2006)). Space Act Agreements are generally used for transactions that cannot be concluded under other NASA authorities such as through standard FAR contracts. See NASA ADVISORY IMPLEMENTING INSTR., NAI 1050-1A, SPACE ACT AGREEMENTS GUIDE app. 1 (Aug. 15, 2008), available at http://nодis3.gsfc.nasa.gov/NPD_attachments/NAI_1050_1A.doc.

²⁸ National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No 101-189, § 251(a), 103 Stat. 1352, 1403 (1989).

²⁹ National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No 102-190, § 826(a), 105 Stat. 1290 (1991) [hereinafter NDAA 1992 and 1993]; see also Kuyath, *supra* note 9, at 528.

³⁰ See NDAA 1992 and 1993, *supra* note 29.

1994 that DARPA's OT authority was expanded beyond research projects to include the procurement of prototypes that are directly relevant to weapons systems.³¹ The rest of DoD received OT-PP authority with the passage of Section 845 of the NDAA 1997.³² The extension of OT-PP authority to the rest of DoD was due in large part to the acquisition reform studies that took place in the 1990s.

B. Influence of Acquisition Reform Studies in the 1990s

The DoD received OT-PP authority because congressional studies in the 1990s determined that regulatory controls were an important factor in the decline of the defense industrial base.³³ A 1992 congressional study found that “[the] Defense Department provisions requiring compliance with the Government Cost Accounting Standards and the Truth in Negotiations Act are serious impediments to commercial companies wishing to sell to the department.”³⁴ Congress and DoD were concerned that government unique procurement requirements required by the FAR “inhibited DOD’s ability to take advantage of technological advances made by the private sector and increased the costs of goods and services DOD acquired.”³⁵ Many of the studies conducted in the early 1990s revealed that contractor compliance with government unique acquisition provisions imposed a significant “cost premium” on government-procured items.³⁶ The results of the studies indicated that government regulation increased the costs of DoD contracts anywhere from 5% to 200%.³⁷

A true empirical quantitative analysis of the burden imposed by DoD unique regulations wasn’t completed until December 1994.³⁸ A study by Coopers & Lybrand with TASC, Inc. entitled *The DoD Regulatory Cost Premium: A Quantitative Assessment* (Coopers Study) determined that compliance with DoD regulations resulted in an eighteen percent cost premium on defense contracts.³⁹ The Coopers Study identified 120 separate DoD regulatory drivers that imposed compliance costs on the ten DoD contractors surveyed.⁴⁰ Furthermore, the study concluded that the top ten regulatory cost drivers accounted for nearly half (8.5%) of the 18% DoD cost premium.⁴¹

In response to the Coopers Study, DoD established working groups and ultimately a Reducing Oversight Cost Reinvention Laboratory (Reinvention Laboratory) to test ways that agencies can improve efficiency and eliminate the cost drivers identified in the Coopers Study.⁴² In addition, in June 1994, Secretary of Defense William Perry issued a directive that eliminated the requirement to comply with overly restrictive military specifications in favor of commercial standards.⁴³

³¹ See NDAA 1994, *supra* note 7.

³² See NDAA 1997, *supra* note 12.

³³ See RAND MEASURING REGULATORY CONSTRAINTS: RESEARCH DESIGN, *supra* note 5, at 8 (citing U.S. Congress, Office of Technology Assessment (1991); U.S. Department of Defense, Defense Systems Management College (1993)).

³⁴ RAND MEASURING REGULATORY CONSTRAINTS: RESEARCH DESIGN, *supra* note 5, at 8 (quoting 1992 U.S. Congress, House of Representatives Committee on Armed Services study).

³⁵ GAO/NSIAD-00-33, *supra* note 8, at 3.

³⁶ See RAND MEASURING REGULATORY CONSTRAINTS: RESEARCH DESIGN, *supra* note 5, at 9. The “cost premium” is defined as “what the DoD pays contractors to cover the added cost of complying with DoD specific statutes and regulations.” *Id.* Stated differently it refers to “all the additional costs DoD pays to contractors in order to cover the cost of complying with DoD-unique statutes and regulations beyond the cost in a purely commercial environment.” *Id.* at 9 n.8.

³⁷ *Id.* at 9.

³⁸ *Id.* at 11.

³⁹ See COOPERS STUDY, *supra* note 10, at 47. The study collected data from April 1994 to September 1994 at a diverse group of ten defense contractor sites including Boeing Defense and Space Group, Oshkosh Truck—Chassis Division, Motorola Government Systems Technology Group, and Hughes Space and Communications Company. *Id.*

⁴⁰ *Id.* app. A.

⁴¹ *Id.* at 18a. The 8.5% of costs attributed to compliance with the top ten cost drivers are broken down as follows: (a) 1.7% for compliance with MIL-Q-9858A (a quality assurance military specification), (b) 1.3% for compliance with the Truth in Negotiations Act (TINA), (c) 0.9% for adhering to the cost/schedule control system, (d) 0.8% for configuration management requirements, (e) 0.7% for contract-specific requirements, (f) 0.7% for DCAA/Defense Contract Management Area Operations (DCMAO) interface, (g) 0.7% for cost accounting standards, (h) 0.6% for material management and accounting system, (i) 0.6% for engineering drawings, (j) 0.5 % for government property administration. *Id.*

⁴² See, RAND MEASURING REGULATORY CONSTRAINTS: RESEARCH DESIGN *supra* note 5, at 15; see also U.S. GEN. ACCOUNTING OFFICE, GAO/NSIAD-97-48, ACQUISITION REFORM: DOD FACES CHALLENGES IN REDUCING OVERSIGHT COSTS (1997) [hereinafter GAO/NSIAD-97-48].

⁴³ See Policy Memorandum from William Perry, Sec'y of Defense to the Secretaries of the Military Dep'ts et al., subject: Specifications & Standards—A New Way of Doing Business (June 29, 1994), available at <http://sw-eng.falls-church.va.us/perry94.html>.

This policy change eliminated the number one cost driver identified in the Coopers Study.⁴⁴ However, according to the GAO, the Reinvention Laboratory had little other success in addressing the other nine cost drivers identified in the Coopers Study.⁴⁵

During this time, individual members of Congress began to look at other alternatives to improve DoD acquisitions. Congressman Robert L. Walker, the Chairman on the U.S. House Committee on Science, discussed the Coopers Study and raised the prospect of expanding the use of “other transaction” authority during a 8 November 1995 hearing on NASA procurement in the Earth Space Economy.⁴⁶ Congressman Walker asked Mr. Richard L. Dunn, the General Counsel of DARPA, if there was any other way for DARPA to escape these defense procurement cost drivers other than by engaging in “other transactions.”⁴⁷ Mr. Dunn responded by saying:

Other than engaging in “other transactions,” a fundamental reform of the procurement system is necessary to eliminate many of the legal and regulatory cost drivers identified in the Coopers and Lybrand study.

Equally if not more profound than the specific cost penalties identified by Coopers and Lybrand are the lost opportunity costs which these government requirements cause. These include the potential benefits of commercial-government integration, access to leading edge technology, and expanded competition resulting from an integrated technology base.⁴⁸

Leaders in the commercial sector were also recommending that all government agencies should be granted DARPA’s other transaction authority for prototype projects.⁴⁹ Removing the barriers to entry presented by the FAR would allow for nontraditional defense contractor participation by leading edge, high-technology commercial companies who otherwise wouldn’t have participated in a DoD program.⁵⁰

As a result of the Coopers Study, and positions of people like Mr. Dunn, Congress granted DoD authority to enter into OT-PPs with the passage of Section 845 of the NDAA for FY 1997.⁵¹ The authority specifies that it is only to “carry out prototype projects that are directly relevant to weapons or weapon systems proposed to be acquired or developed by the Department of Defense.”⁵² The OT-PP authority provides DoD with a vital tool in its procurement strategy since instruments awarded pursuant to this authority generally are not required to comply with the FAR, its supplements, or laws that are limited in applicability to procurement contracts.⁵³ Consequently, DoD contracting officials have the freedom to structure agreements as they consider appropriate.⁵⁴ However, as will be discussed in the next section, the DoD has been unable to measure if the expected benefits of using OT-PP agreements such as reduced acquisition costs, increased commercial-government integration, access to leading edge technology, and expanded competition,⁵⁵ are taking place.

Performance specifications shall be used when purchasing new systems, major modifications, upgrades to current systems, and non-developmental and commercial items, for programs in any acquisition category. If it is not practicable to use a performance specification, a non-government standard shall be used. . . . [T]he use of military specifications and standards is authorized as a last resort

Id.

⁴⁴ See COOPERS STUDY, *supra* note 10.

⁴⁵ See GAO/NSIAD-97-48, *supra* note 42, at 6.

⁴⁶ *NASA Procurement in the Earth-Space Economy: Hearing Before the H. Comm. on Science*, 104th Cong. 183 (1995) [hereinafter NASA Hearing].

⁴⁷ *Id.*

⁴⁸ *Id.* at 184. (Mr. Dunn’s response to Congressman Walker’s question). Mr. Dunn was a former member of the Air Force Judge Advocate General Corps, who previously worked for seven years in the General Counsel’s office of NASA.

⁴⁹ See Kuyath, *supra* note 9, at 528.

⁵⁰ *Id.* at 523–24.

⁵¹ See NDAA 1997, *supra* note 12.

⁵² *Id.*

⁵³ See OT GUIDE, *supra* note 9, at 11.

⁵⁴ See generally GAO/NSIAD-00-33, *supra* note 8, at 3.

⁵⁵ See NASA Hearing, *supra* note 47.

III. Criticisms of Department of Defense's "Other Transaction" Authority Use

While DoD received basic OT authority in 1991⁵⁶ and OT-PP authority in 1997⁵⁷ an April 2000 report by the GAO indicated mixed results with DoD's ability to utilize its OT authority.⁵⁸ Increasing participation by nontraditional defense contractors was one of the aims of granting DoD OT authority; however, the GAO reported that as of 1998 only thirteen out of ninety-seven OT projects were awarded to nontraditional defense contractors.⁵⁹ Additionally, the GAO noted that while DoD claimed that OT agreements reduced negotiating, administrative, or overhead costs typically associated with a standard contract, few programs provided any estimates of specific dollar savings.⁶⁰ Only thirty-four of the ninety-seven projects established performance metrics and the metrics used in those thirty-four programs were of little value because they did not evaluate the relative performance of using an OT agreement versus a traditional contracting method.⁶¹ Therefore, it was impossible to determine if using OT agreements resulted in any reductions in cost or improvements in performance over what could have been achieved by using traditional procurement methods.⁶² While the GAO indicated that tracking nontraditional defense contractor participation in OT-PPs could be a useful metric, the GAO recommended that the Secretary of Defense establish additional meaningful metrics that directly reflect the benefits of using OT-PP agreements⁶³

In response to the 2000 GAO report, DoD contracted with RAND's National Defense Research Institute for a study to assess the use of OT-PPs and whether the expected benefits from relaxing the process controls justify the possible costs that might be incurred.⁶⁴ The RAND study concluded that the OT process provided broad benefits including access to commercial developments in cutting edge technologies, innovative business relationships, and flexibility to manage risks.⁶⁵ However, RAND was unable to quantify the benefits of using OT-PPs versus traditional contracting methods in an "analytically rigorous manner"⁶⁶ because the DoD failed to identify any performance metrics other than nontraditional defense contractor participation.⁶⁷

The RAND report stated that nontraditional defense contractor participation was "misleading" as a performance metric because it didn't measure the effects of "OT on program outcomes and [achieving] OT's broader policy goals."⁶⁸ The RAND study and a DoD working group composed of officials from across DoD, considered other types of metrics that could be used to assess the effectiveness of Section 845 agreements.⁶⁹ However, the two efforts identified several difficulties in developing metrics that could be used to assess the effectiveness of Section 845 agreements, as follows:

- Traditional metrics—such as cost growth, schedule slips, and performance shortfalls—are inappropriate for Section 845 projects that are inherently risky.
- A "path not taken" cannot be measured; that is, when a Section 845 agreement is used rather than a procurement contract, a statistical comparison between the two acquisition approaches cannot be made.

⁵⁶ See NDAA 1992 and 1993, *supra* note 29.

⁵⁷ See NDAA 1997, *supra* note 12.

⁵⁸ See GAO/NSIAD-00-33, *supra* note 8. This included fifty-six projects by the Army, Air Force, and Navy in FY 1997 and FY 1998 along with thirty-four projects by DARPA from FY 1994 to FY 1998, four projects by the National Imagery and Mapping Agency in FY 1997 and FY 1998, and two projects by the Air Force in FY 1999. *Id.*

⁵⁹ *Id.* at 14.

⁶⁰ *Id.* at 17.

⁶¹ *Id.* at 29 (stating sixty of the cases reported that they did not establish metrics and three programs did not respond to the GAO's inquiries).

⁶² *Id.* at 30. The GAO noted that in one program a metric was whether the contractor was able to reduce materials cost from \$60 per pound to around \$35 to \$40 per pound; however, there was no indication if the success of achieving this goal was due to the use of the OTA agreement. *Id.*

⁶³ *Id.* at 32.

⁶⁴ See RAND 2002 OT STUDY, *supra* note 13, at vii.

⁶⁵ *Id.* at 31.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 9. The broader policy goals of OT programs as interpreted from the RAND reports opening paragraph are "streamlining the [acquisition] process by reducing the burden caused by regulations and oversight procedures and adopting commercial practices and products." *Id.* at 1.

⁶⁹ See U.S. GEN. ACCOUNTING OFFICE, GAO-03-150, DEFENSE ACQUISITIONS: DoD HAS IMPLEMENTED SECTION 845 RECOMMENDATIONS BUT REPORTING CAN BE ENHANCED 7 (2002) [hereinafter GAO-03-150].

- Too many variables and too few Section 845 agreements would limit the results of a quantitative analysis.
- Few Section 845 projects have been completed, limiting the results to date.⁷⁰

Because of these difficulties, the DoD adopted nontraditional defense contractor participation as the sole quantitative performance metric for OT-PPs in the January 2001 “Other Transactions” Guide for Prototype Projects.⁷¹ In October 2002, the GAO accepted DoD’s sole metric of nontraditional defense contractor participation as satisfying its April 2000 recommendations; however, it still criticized DoD for “not regularly assessing or reporting on the benefits derived from completed Section 845 projects.”⁷² The GAO stated “[i]n the absence of regular assessments of the benefits derived from completed projects, DOD and the Congress lack vital information on the results the government is deriving from this flexible procurement strategy.”⁷³ Six years later, the DoD continues to lack information on the performance of OT-PPs.

In 2003, Congress reauthorized DoD’s use of OT authority until 30 September 2008.⁷⁴ Subsequently, in January 2008, Congress extended OT authority to DoD through 30 September 2013.⁷⁵ Interestingly, the NDAA for FY 2004 removed the requirement for DoD to submit annual reports to Congress on OT transactions after FY 2006.⁷⁶ The removal of the congressional reporting requirement after FY 2006 is curious considering that some members of Congress criticized the use of OT authority in some instances.⁷⁷ In 2005, Senator John McCain, then Chairman of the Subcommittee on Airland, Senate Armed Services Committee, criticized the Army for its continued use of OT authority on the Army’s multibillion dollar Future Combat System program:

Since [the passage of the National Defense Authorization Act for 1994, which extended OT authority to prototype projects], DOD officials and industry have repeatedly requested that we extend “Other Transaction Authority” to production contracts. Congress has consistently refused to do so, because we have taken the view that with hundreds of millions or even billions of dollars at stake, the taxpayer needs the protections built into the traditional procurement system. While we recognize that there may be [a] need to continue doing business with nontraditional contractors in the production phase of a program, we have preferred to address this issue through targeted waivers that are limited to those companies who need them.

Now, the Army has put forward a program that uses “Other Transaction Authority” for a \$20 billion contract, a figure much greater than the Congress intended and [it is] unprecedented.⁷⁸

Senator McCain later met with the Secretary of the Army who concurred with Senator McCain’s concerns and agreed to convert the Army’s Future Combat System (FCS) program’s OT “to a FAR based contract, with provisions typically used to protect taxpayer’s interests and help prevent fraud, waste and abuse specifically included.”⁷⁹ In light of this experience on the FCS program, it might be wise for DoD to consider reinstating the annual OT reporting requirement with more than just nontraditional contractor participation as a performance metric.

The Project on Government Oversight⁸⁰ also criticized the government’s use of OT on the FCS and in missile defense programs and even proposed that the government should prohibit any contractor who has accepted a FAR contract from

⁷⁰ *Id.*

⁷¹ See OT GUIDE, *supra* note 9, at 17 (requiring that agencies identify all prime awardees as either Non-profit, Traditional contractor, or Nontraditional defense contractor).

⁷² See GAO-03-150, *supra* note 69, at 2.

⁷³ *Id.* at 10.

⁷⁴ See National Defense Authorization Act for Fiscal Year 2004, Pub L. No 108-136, § 847(a), 117 Stat. 1392, 1554 (2003) [hereinafter NDAA 2004].

⁷⁵ See National Defense Authorization Act for Fiscal Year 2008, Pub. L. No 110-181 § 823(a), 122 Stat. 3, 226.

⁷⁶ NDAA 2004, *supra* note 74, § 847(a).

⁷⁷ See L. ELAINE HALCHIN, CONG. RESEARCH SERV. REPORT, OTHER TRANSACTION (OT) AUTHORITY, RL34760 (2008),

⁷⁸ *Id.* at CRS-36. (quoting *Army Transformation and the Future Combat System: Hearing Before the Subcomm. on Airland of the S. Comm. On Armed Services*, 109th Cong. (2005) (opening statement of Sen. John McCain) [hereinafter Sen McCain opening statement], available at http://mccain.senate.gov/public/index.cfm?FuseAction=PressOffice.FloorStatements&ContentRecord_id=8E05F19E-3521-4789-BC59-379C19F8CC29).

⁷⁹ *Id.* at CRS-37 (quoting Sen. McCain opening statement).

⁸⁰ The Project on Government Oversight is an independent nonprofit organization “that investigates and exposes corruption and other misconduct in order to achieve a more effective, accountable, open, and honest federal government.” Project On Government Oversight, <http://www.pogo.org/> (last visited July 1, 2009).

receiving an OT.⁸¹ Considering that the majority of OT projects are awarded to traditional defense contractors⁸² such a drastic legislative response could have a significant negative impact on future OT-PPPs. Meaningful performance metrics that prove the value of OT agreements versus traditional contracting methods would go a long way towards proving the appropriateness of using OTs for future DoD procurements.

IV. Recommendations for Effective Performance Metrics for Other Transactions

Nontraditional defense contractor participation is one of the intended goals and expected benefits of OT authority; however, it was never the sole purpose of granting DoD OT authority.⁸³ Nontraditional defense participation by itself does not automatically lead to an advancement of technology for DoD. The DoD benefits from nontraditional defense contractor participation in OT-PPPs when cutting edge technologies are introduced that traditional DoD contractors do not possess.⁸⁴ However, DoD fails to measure if OT-PPPs are achieving this result.⁸⁵ Another expected benefit of OT-PPPs was to reduce DoD procurement costs by reducing the amount of contractor compliance costs that were identified in the Coopers Study.⁸⁶ In addition, DoD's sole performance metric of nontraditional contractor participation fails to reveal any data on procurement cost savings.⁸⁷ Therefore, focus on nontraditional defense contractor participation as a performance metric for OT-PPPs is misplaced. It is not an effective metric to determine if DoD is procuring prototypes at a lower cost, in less time, or with better performance characteristics than if DoD had used traditional contracting methods.

The DoD's OT Guide encourages OT programs to "establish and track any other metrics that measure the value or benefits directly attributed to the use of OT authority."⁸⁸ However, a 2003 GAO report concluded that with the exception of tracking nontraditional defense contractor participation in OT-PPPs, regular assessments on the effectiveness of completed OT-PPPs has been relatively absent.⁸⁹ A primary reason for the difficulty in measuring the performance of an OT-PPPs identified in the 2002 RAND study was that one cannot measure the "path not taken" to compare the progress of an OT-PP versus the progress of an identical program performed using traditional contracting methods.⁹⁰

However, the GAO identified one U.S. Air Force (USAF) agreements officer who believed that, if required, he could have come up with useful metrics to measure the relative performance of OT-PPPs versus traditional contracting methods.⁹¹ According to the USAF agreements officer, using an OT-PP agreement reduced the negotiation and approval times typically encountered under traditional procurement methods and the

use of more flexible data rights encouraged technical innovation on the part of contractor. While [the USAF agreements officer did] not establish metrics for his program, he believed that he could have measured (1) negotiation times compared to that required for a standard contract and (2) indirect cost savings directly attributable to the agreement's reduced administrative requirements. On another project, [GAO] officials noted that while time spent on administering agreements [was] considerably less than the time administering a standard contract, their management system [did] not track administration time by instrument type.⁹²

⁸¹ Project on Government Oversight, Future Combat System to be Restructured (Apr. 5, 2005), <http://www.pogo.org/pogo-files/alerts/national-security/nfcs-20050405.html>.

⁸² See Hanson, *supra* note 21, at 48. Only 6.9% of the \$5.7 billion awarded in other transaction and cooperative agreements from FY 1997 to FY year 2003 were awarded directly to "non traditional" prime contractors. *Id.* Eighty-seven awards were made to "non traditional" prime contractors but 153 awards were made to major DoD contractors with no non traditional contractor participation. *Id.*

⁸³ See discussion *supra* Part II.

⁸⁴ See NASA Hearing, *supra* note 46, at 183 (referencing Mr. Dunn's comments about how OT authority prevents the DoD from suffering "lost opportunity costs" and enables the DoD to "access to leading edge technology").

⁸⁵ See discussion *supra* Part III.

⁸⁶ See COOPERS STUDY, *supra* note 10.

⁸⁷ See RAND 2002 OT STUDY, *supra* note 13, at 9.

⁸⁸ OT GUIDE, *supra* note 9, at 17.

⁸⁹ See GAO-03-150, *supra* note 69, at 10.

⁹⁰ RAND 2002 OT STUDY, *supra* note 13, at 9.

⁹¹ See GAO/NSIAD-00-33, *supra* note 8, at 30.

⁹² *Id.*

These are just two examples of how the DoD can measure the relative performance of OT-PPs versus traditional contracting methods.

The DoD is not alone in failing to identify useful performance metrics for OT-PPs. The Department of Homeland Security (DHS) received authority to enter into other transactions in 2002⁹³ and the DHS believes that some of the OTA agreements have resulted in time and cost savings as compared to traditional FAR based contracts.⁹⁴ However, the GAO criticized the DHS for not formally collecting or sharing information about “whether other transactions have been successful in supporting projects or what factors led to success or failure.”⁹⁵ While the DHS hired a consultant to develop a “lessons learned” document based on DoD’s experience, DHS did not develop a system for “capturing knowledge from its own projects, which may limit its ability to learn from experience and adapt approaches going forward.”⁹⁶

A recently completed 2007 RAND study entitled *Measuring the Statutory and Regulatory Constraints on Department of Defense Acquisition: an Empirical Analysis* (2007 RAND Study) might prove very useful as a model for future studies that could examine the effectiveness of OT-PPs versus traditional contracting methods.⁹⁷ Similar to the Coopers Study, the 2007 RAND Study tried to capture the actual cost of compliance with burdensome government statutes and regulations on DoD procurement.⁹⁸ However, unlike the Coopers Study, the 2007 RAND Study focused on costs from the government’s perspective at the program office level.⁹⁹ The study collected empirical data from seven different DoD procurement programs in various stages of lifecycle development for a twelve month period in 2004 to 2005. The 2007 RAND Study focused on identifying the amount of time program office members spent on complying with burdensome statutory and regulatory costs divided among the following five cost areas: Clinger Cohen Act,¹⁰⁰ the Core Law and 50-50 rule,¹⁰¹ program status reporting, programming planning and budgeting, and testing. The results of the study were surprising in that the “amount of time spent by program office on compliance with activities associated with the five statutory and regulatory areas was less than five percent of the total time available to all staff in the program office.”¹⁰² The 2007 RAND Study predicted the amount of time would be much higher.¹⁰³

At first glance, the 2007 RAND Study seems to indicate that the compliance costs for government procurements is much lower than anticipated.¹⁰⁴ However, the 2007 RAND Study results should be interpreted narrowly since the Study only measured the compliance costs from the government program office perspective for a select few regulations.¹⁰⁵ The 2007 RAND Study did not include costs that accrue at the contractor level, which is what OT-PPs are designed to address.¹⁰⁶ Additionally, the 2007 RAND Study did not include costs that accrue due to contracting issues (e.g., FAR, Defense Finance Acquisition Regulation Supplement (DFARS), Competition in Contracting Act (CICA), Truth in Negotiations Act (TINA), Buy American Act, technical data (Bayh-Dole Act), or logistics and support.¹⁰⁷ The contractor costs that were not measured

⁹³ Homeland Security Act of 2002, Pub. L. No 107-296, 116 Stat. 2135.

⁹⁴ U.S. GOV. ACCOUNTABILITY OFFICE, GAO/NSIAD-08-417T, DEPARTMENT OF HOMELAND SECURITY: STATUS AND ACCOUNTABILITY CHALLENGES ASSOCIATED WITH THE USE OF SPECIAL DHS ACQUISITION AUTHORITY 7 (2008).

⁹⁵ U.S. GOV. ACCOUNTABILITY OFFICE, GAO-08-1088, DEPARTMENT OF HOMELAND SECURITY: IMPROVEMENTS COULD FURTHER ENHANCE ABILITY TO ACQUIRE INNOVATIVE TECHNOLOGIES USING OTHER TRANSACTION AUTHORITY 12 (2008).

⁹⁶ *Id.* at 13.

⁹⁷ JEFFREY A. DREZNER ET AL., RAND NATIONAL DEFENSE RESEARCH INSTITUTE, MG-569-OSD, MEASURING THE STATUTORY AND REGULATORY CONSTRAINTS ON DOD ACQUISITION: AN EMPIRICAL ANALYSIS (2007) [hereinafter RAND MEASURING REGULATORY CONSTRAINTS: EMPIRICAL ANALYSIS], available at <http://www.rand.org/pubs/monographs/MG569/>; see also RAND MEASURING REGULATORY CONSTRAINTS: RESEARCH DESIGN, *supra* note 5.

⁹⁸ See RAND MEASURING REGULATORY CONSTRAINTS: RESEARCH DESIGN, *supra* note 5, at x.

⁹⁹ *Id.* at ix.

¹⁰⁰ *Id.* at 31. The Clinger-Cohen Act (National Defense Authorization Act for Fiscal Year 1996, Div E, Pub. L. No. 104-106, 110 Stat. 186), officially known as the Information Technology Reform Act, incorporated stringent processes into the way federal agencies acquire Information Technology systems. *Id.*

¹⁰¹ *Id.* at 32. The Core Law (10 U.S.C. § 2464 (2006)) and 50-50 Rule (10 U.S.C. § 2466) require that public depots perform 50% of the DoD wide maintenance workload. *Id.*

¹⁰² RAND MEASURING REGULATORY CONSTRAINTS: EMPIRICAL ANALYSIS, *supra* note 97, at 17.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

by the 2007 RAND Study could be significant especially since the Coopers Study predicted that contractor costs for accounting and finance related activities were 3.4%, contracting and purchasing 2.2%, TINA 1.7%, Logistics, Materials Management and Property Administration 1.7%.¹⁰⁸ Recognizing the narrow scope of their 2007 RAND Study, RAND concluded that “to better understand the full costs of regulatory compliance, costs at these other levels should be explored using a similarly empirical approach.”¹⁰⁹

While the results of the 2007 RAND Study should be interpreted narrowly, the soundness and thoroughness of the empirical approach to collecting data offers a potential solution to overcoming the difficulty in measuring “the path not taken” for OT-PP programs identified in the RAND 2002 OT Study.¹¹⁰ In the 2007 RAND Study, RAND enrolled a total of 316 government personnel from seven different programs offices and collected data on a bi-weekly basis through a user friendly web based data collection tool for a total of twelve months.¹¹¹ A study using the same empirical approach could collect data from contractors engaged in traditional government procurements and then compare it with data collected from contractors engaged in similar types of OT-PPs.¹¹² The data collected from comparison studies could confirm if OT-PPs save the 18% of government compliance costs identified in the Cooper Study.¹¹³ Results from these comparison studies could be used by the President and Congress to decide if expansion into OT-PPs into other areas of DoD procurement would be valuable.

Comparison studies are not the only method to measure the effectiveness of OT-PPs versus traditional contracting methods. A primary reason OT-PPs are chosen as a procurement method over traditional methods is because DoD contractors fear that the strict provisions of the Bayh-Dole Act¹¹⁴ will undermine the companies’ intellectual property rights in a traditional procurement.¹¹⁵ For example, in a recent OT-PP conducted with JDS Uniphase Corporation¹¹⁶ for the development of high powered lasers, the annual OT report to Congress indicated that the program would not have even taken place but for the availability of OT-PPs as a contracting vehicle.

Certain rights pertaining to intellectual property rights (Bayh-Dole) were very important to JDS and, in large part, the reason they have been unwilling to do business with the DoD in the recent past. These issues required additional negotiation and flexibility in the provisions ultimately agreed upon between the parties.¹¹⁷ This flexibility and tailoring was possible only with the use of an other transaction.¹¹⁷

Requiring the DoD to inform Congress that “but for” the OT-PP, the DoD would not have developed a certain technology, would also be a useful measure of performance for OT-PPs.

V. Conclusion

Comparing the effective performance of OT-PPs versus traditional contracting methods is challenging. As the RAND 2002 OT study indicated, it is hard to measure the “path not taken.”¹¹⁸ However, the 2007 RAND Study empirical approach to gathering data offers a possible solution to this inherent difficulty.¹¹⁹ The data collection methods could be used in both

¹⁰⁸ See COOPERS STUDY, *supra* note 10, at 52a.

¹⁰⁹ RAND MEASURING REGULATORY CONSTRAINTS: EMPIRICAL ANALYSIS, *supra* note 97, at 61.

¹¹⁰ See RAND 2002 OT STUDY, *supra* note 13, at 9.

¹¹¹ *Id.* at 11.

¹¹² It would be cost ineffective to duplicate a traditional procurement program with an OT-PP simply to measure the differences in compliance costs. However, traditional procurements could be matched with OT-PPs that are similar in program cost and technical objectives to ensure an “apples to apples” comparison.

¹¹³ See OT GUIDE, *supra* note 9, app. 1 (listing the statutory and regulatory requirements inapplicable to OT-PPs).

¹¹⁴ 35 U.S.C. §§ 200–212 (2006).

¹¹⁵ See Summerill, *supra*, note 23.

¹¹⁶ As indicated on their company website, JDS Uniphase Corporation is “[a] leading provider of optical products and test and measurement solutions for the communications industry, the JDSU technology portfolio is a key enabler for optical solutions in industries such as broadband communications, semiconductor manufacturing, document authentication, brand protection, and biotechnology.” See JDSU Enabling Broadband and optical Innovation, <http://www.jdsu.com/company.html> (last visited July 1, 2009).

¹¹⁷ U.S. DEP’T OF DEFENSE, ANNUAL REPORT ON COOPERATIVE AGREEMENTS AND OTHER TRANSACTIONS ENTERED INTO DURING FY2005 UNDER 10 USC 2371, at 82 (2006), available at <http://www.acq.osd.mil/dpap/policy/attachments/fy-05-congressional-report20060130.pdf>.

¹¹⁸ RAND 2002 OT STUDY, *supra* note 13, at 9.

¹¹⁹ RAND MEASURING REGULATORY CONSTRAINTS: EMPIRICAL ANALYSIS], *supra* note 97, at 17.

traditional procurements and OT-PPs and compared to one another to measure the contractor costs for complying with government unique requirements. This would provide the President and Congress with qualitative data to support use of OT-PPs in lieu of traditional procurements.

Relative cost savings is not the only metric that could be evaluated. The amount of time that each step of the procurement process takes is another possible metric. The USAF OT-PP agreements officer who said that he could have measured the negotiation times for an OT-PP and compared them to the time required for a standard contract is just one example.¹²⁰ Lastly, the DoD could measure the number of successful procurements that occur only because contractors are willing to do business with the DoD using an OT-PP. If the President and Congress discover that certain DoD products or services are developed only because of the flexible provisions contained in OT-PPs, they will have solid proof of the usefulness of OT-PPs as a necessary alternative to traditional contracting methods.

Congress granted DoD OT authority to eliminate the legal and regulatory cost drivers associated with the traditional DoD procurement system and to gain access to leading edge technologies.¹²¹ However, to date, there has not been a useful comparison of OT authority performance versus traditional contracting methods. Until the DoD establishes useful performance metrics for OT-PPs, the President and Congress will never know if the DoD is achieving the intended benefits of OT-PP authority. Likewise, possible expansion of OT-PPs into other areas of DoD procurement to potentially fix a “procurement process gone amuck”¹²² will never occur.

¹²⁰ See GAO/NSIAD-00-33, *supra* note 8, at 30.

¹²¹ See NASA Hearing, *supra* note 47 (Mr. Dunn’s comments).

¹²² Fiscal Summit Press Release, *supra* note 1 (quoting President Barack Obama).

Targeting War-Sustaining Capability at Sea: Compatibility with Additional Protocol I

*Lieutenant David A. Melson**

The power to maintain war, if not to launch it, had passed out of the military sphere of the soldier and into that of economics.¹

I. Introduction

The laws of targeting at sea have not kept pace with contemporary state practice and law. In particular, the practice of attacking economic (“war-sustaining”) targets at sea requires clarification to demonstrate its continuing legality. Additional Protocol I to the 1949 Geneva Conventions (Additional Protocol I) introduced a restrictive definition of a military objective, aspiring to restrict the use of force in armed conflict.² It is generally recognized as an authoritative expression of legal constraints on targeting.³ Despite the widespread adoption of Additional Protocol I, its application to naval warfare is unclear. The U.S. Navy’s *Commander’s Handbook on the Law of Naval Operations (Commander’s Handbook)* offers a competing definition of a legitimate military objective, permitting the targeting of adversaries’ war-sustaining capability.⁴ Scholarly debate has compared and contrasted the Additional Protocol I definition of a target with that found in the *Commander’s Handbook*.⁵ However, this debate generally concerns the direct targeting of civilian persons, rather than the traditional economic objectives of naval campaigns.⁶ The definition of targeting war-sustaining assets at sea needs clarification to affirm its compatibility with international law and to better distinguish the law of war at sea from the laws of land warfare.

Maritime warfare’s long association with maritime trade, the failure of previous attempts to restrict economic warfare at sea, and the historical practice of states, render the legal status of economic warfare at sea unclear.⁷ Defined broadly, economic warfare at sea is the interdiction of a state’s maritime trade network through force (destroying merchant shipping) or the threat of force (blockades).⁸ It has lengthy historic precedents.⁹ Naval power is closely linked to global maritime

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¹ B. H. LIDDELL HART, HISTORY OF THE SECOND WORLD WAR 22 (1971).

² Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Conflicts (Protocol I) art. 51, June 8, 1977, U.N. Doc. A/32/144, Annex I [hereinafter Protocol I].

³ See, e.g., Prosecutor v. Zejnil Delalic (Čelebići Case), Case No. IT-96-21-A, Judgment of the Appeals Chamber, ¶ 182 (Feb. 20, 2001); Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, 39 I.L.M. 1257, 1283 (2000); see also U.S. NAVAL WAR COLLEGE, ANNOTATED SUPPLEMENT TO THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, INT’L L. STUD. NO. 73, at 401–05 (A. R. Thomas & James C. Duncan eds., 1999) [hereinafter ANNOTATED SUPPLEMENT].

⁴ DEP’T OF NAVY & DEP’T OF HOMELAND SECURITY, NWP 1-14M/MCWP 5-12.1/COMDTPUB P5800.7A, THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS 5-3 (July 2007) [hereinafter COMMANDER’S HANDBOOK]. Although the *Commander’s Handbook* does not limit its definition of legal targets to naval operations, this article refers to “war-sustaining” targets in the context of naval operations only. See *id.* This article also excludes the use of naval forces to deliver nuclear weapons, a situation defying the limitations of international law. See Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 262–264 (8 July).

⁵ E.g., Brigadier-General Kenneth Watkin, *Canada/United States Military Interoperability and Humanitarian Law Issues*, 15 DUKE J. COMP. & INT’L L. 281 (2005) (rejecting “war-sustaining” rationale); Yoram Dinstein, *Legitimate Military Objectives Under Current Jus in Bello*, 31 ISR. Y.B. ON HUM. RTS., at 1, 7 (2001) (targeting war-sustaining assets “goes too far”); Horace B. Robertson, Jr., *The Principle of the Military Objective in the Law of Armed Conflict*, 8 U.S.A.F.A. J. L. STUD. 35, 53–55 (1998) (incorporation of core Additional Protocol I targeting principles into customary international law).

⁶ The proposed San Remo Manual seeks to address some of these shortcomings; however, it is an aspirational “model code” proposed by a non-governmental organization, not a binding international agreement. See SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA, 12 June 1994, available at <http://www.icrc.org/ihl.nsf/FULL/560?OpenDocument>; see also Louise Doswald-Beck, *The San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, 89 AM. J. INT’L. L. 192, 200 (1995) (providing background of San Remo Manual and rejection of war-sustaining concept).

⁷ See generally NEILL ALFORD, MODERN ECONOMIC WARFARE, INT’L L. STUD. NO. 56 *passim* (1967) (comprehensive discussion of laws related to economic warfare, but written before adoption of Additional Protocol I and concerned primarily with World War II).

⁸ Lengthy and complex rules traditionally governed both blockades and attacks on merchant shipping. Their continued relevance is debatable. This article, however, is concerned with the general propriety of attacking economic resources at sea, rather than the specific means employed. See generally L. F. E. Goldie, *Targeting Merchant Shipping: An Overview of Law and Practice*, in TARGETING ENEMY MERCHANT SHIPPING, INT’L L. STUD. NO. 65, at 2, 2–28

trade. For centuries, states attacked maritime trade during periods of armed conflict as a method of warfare, hoping to hinder their opponents' war efforts and their ability to project power overseas.¹⁰

Global economic changes of the late twentieth century did not diminish the importance of maritime trade as a strategic center of gravity.¹¹ The most recent expression of the United States' national maritime strategy reaffirms the role of naval power in protecting maritime trade.¹² Recent economic studies confirm that the majority of the world's trade goods travel by sea.¹³ No other mode of transportation has supplanted maritime trade as a means of moving goods between states over long distances.¹⁴

However, Additional Protocol I and other recent contributions to the law of war generally concern conflicts between states and non-state or sub-national actors.¹⁵ They tend to ignore naval conflict, a method of warfare almost exclusively involving state actors and frequently concerned with the economics of warfare.¹⁶ Combined with the general absence of relevant state practice, the legal boundaries of targeting war-sustaining resources remain more permissive than the targeting of civilian objects on land.¹⁷

The lack of clear, modern rules regarding targeting at sea contrasts with the well-developed rules of targeting for land forces.¹⁸ While the United States does not consider all of Additional Protocol I to codify customary international law, most scholars agree that its targeting protocols are customary international law.¹⁹ Unwise application of those rules to naval warfare would essentially prohibit targeting economic resources at sea. Denying naval forces a traditional and legal target set through the application of rules of warfare derived from state practice on land denies military planners a useful strategy and risks prolonging conflicts.²⁰

(Richard J. Grunawalt ed., 1993) (overview of rules governing targeting of neutral and hostile vessels); *see also* ROBERT W. TUCKER, THE LAW OF WAR AND NEUTRALITY AT SEA, INT'L L. STUD. NO. 50, at 26–32 (1955) (sources of law of war at sea).

⁹ Early twentieth century naval thinkers studied the lengthy history of commerce raiding as an essential component of strategy. The revision of strategic thought prompted by modern, industrial navies did not diminish the economic aspects of naval warfare. *See, e.g.*, PHILIP HOWARD COLOMB, I NAVAL WARFARE 29–31, 39 (Naval Inst. Press 1990) (1899); *see also* JON TETSURO SUMIDA, INVENTING GRAND STRATEGY AND TEACHING COMMAND 45–48 (1997) (interpreting Alfred Thayer Mahan's analysis of naval warfare and commerce).

¹⁰ *See, e.g.*, SAM WILLIS, FIGHTING AT SEA IN THE EIGHTEENTH CENTURY *passim* (2008); ERIC JAY DOLIN, LEVIATHAN: THE HISTORY OF WHALING IN AMERICA 156–58, 200–02 (2007) (describing the whaling industry as a target of American and British forces in 1775–1780 and 1812–1814); LANCE EDWIN DAVIS & STANLEY L. ENGERMAN, NAVAL BLOCKADES IN PEACE AND WAR: AN ECONOMIC HISTORY SINCE 1750 *passim* (2006) (overview of tradition of blockades).

¹¹ U.N. Conf. on Trade and Dev., *Review of Maritime Transportation*, at xiii, U.N. Doc. UNCTAD/RMT/2008 (Jan. 11, 2008) [hereinafter *Review of Maritime Transportation*] (“With over 80 percent of world merchandise trade by volume being carried by sea, maritime transport remains the backbone supporting international trade and globalization.”).

¹² DEP'T OF NAVY & DEP'T OF HOMELAND SECURITY, A COOPERATIVE STRATEGY FOR 21ST CENTURY SEAPOWER 13 (Oct. 2007) (“[N]or will we permit an adversary to disrupt the global supply chain by attempting to block vital sea-lanes of communication and commerce.”).

¹³ *See Review of Maritime Transportation*, *supra* note 11, at 5–9; *see also* U.S. DEP'T OF TRANSPORTATION MARITIME ADMIN., U.S. WATER TRANSPORTATION STATISTICAL SNAPSHOT 9 (May 2008) [hereinafter DoT MARITIME ADMIN.] (noting that U.S. foreign trade accounted for 19% of global maritime commerce).

¹⁴ *See* DoT MARITIME ADMIN., *supra* note 13 (observing only rail travel as a more energy-efficient mode of transportation than maritime travel).

¹⁵ *See, e.g.*, Watkin, *supra* note 5, at 296–98 (relationship between Additional Protocol I and non-state actors).

¹⁶ *See* HOSSEIN G. ASKARI ET AL., ECONOMIC SANCTIONS 1–31 (2003) (historical economic analysis of sanctions and blockades). *But see* GRETCHEN PETERS, SEEDS OF TERROR: HOW HEROIN IS BANKROLLING THE TALIBAN AND AL QAEDA (2009) (suggesting strategy of eliminating terrorists economic support).

¹⁷ State practice is a necessary requirement to form a rule of customary international law. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 102(2) (1987).

¹⁸ *See generally* INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CTR. & SCH., OPERATIONAL LAW HANDBOOK 12–25 (2008) (outlining authorities relevant to targeting decisions on land).

¹⁹ *E.g.*, Robertson, *supra* note 5, at 53–55.

²⁰ Admittedly, the efficacy of economic warfare is not universally accepted; historians continue to debate historic examples. Lance Davis & Stanley Engerman, *Economic Warfare, Naval Blockades, and the Continental System*, in ELI HECKSCHER, INTERNATIONAL TRADE, AND ECONOMIC HISTORY 348–51 (2006); Tor Egil Førland, *The History of Economic Warfare: International Law, Effectiveness, Strategies*, 30 J. OF PEACE RES. 2, 159–60 (1993).

II. The Problem of Defining and Targeting War-Sustaining Assets

The *Commander's Handbook* does not clearly define “war-sustaining” targets. The *Annotated Supplement to the Commander's Handbook on the Law of Naval Operations (Annotated Supplement)*, in essence the official commentary, offers a more detailed discussion.²¹ It provides examples of “[p]roper economic targets,” including “enemy lines of communication, rail yards, bridges, rolling stock, lighters, industrial installations producing war-fighting products, and power generation plants.”²² The *Annotated Supplement* explains the list, noting “[e]conomic targets . . . that indirectly but effectively support and sustain the enemy’s warfighting capability may also be attacked.”²³ However, the primary example given for such a target, destruction of cotton during the American Civil War, is outdated and misleading.²⁴

The definition of legitimate targets found in the *Commander's Handbook* needs clarification to distinguish targeting civilians or civilian morale from targeting materiel resources that logically but indirectly support a state’s military.²⁵ Commentators offer “slippery slope” arguments against the war-sustaining concept of targeting. They claim it could lead to the wholesale destruction of cities, permanent environmental damage, or other actions prohibited by treaties and customary international law.²⁶ However, analyzing historical naval operations against economic targets and the influence of contemporary international law reveals a narrower interpretation of war-sustaining that is compatible with international humanitarian law.

III. Historic Practices and Twentieth Century Humanitarian Responses

The evolution of technologically-advanced, industrial navies shifted strategists’ interests from the capture of enemy merchant vessels to the direct targeting of enemy warships.²⁷ During World War I, combatants sought to gain strategic advantages by economically isolating each other through blockades.²⁸ Allied powers, enjoying superior naval forces, executed a traditional blockade while Germany declared, for the first time in history, a campaign of “unrestricted submarine warfare,” effectively targeting any Allied vessel.²⁹ The campaign aimed to deprive the United Kingdom of imperial resources and military supplies provided by the United States.³⁰

Germany’s campaign against Allied shipping provoked an outcry during and after the war, while the effective Allied blockade of Germany actually continued until 1919.³¹ Allied and Triple Alliance powers, primarily Germany, argued over the legality of the campaign, accusing each other of violating the law of war.³² Public protest over the sinking of passenger

²¹ ANNOTATED SUPPLEMENT, *supra* note 3, at 402.

²² *Id.*

²³ *Id.* at 403.

²⁴ The Confederacy relied on cotton for war-sustaining income but it is not clear if Union forces had other motivations. General William T. Sherman ordered the destruction of civilian property, not only to halt the Confederate military, but also “to make old and young, rich and poor, feel the hard hand of war . . .” WILLIAM T. SHERMAN, MEMOIRS 616 (Barnes & Noble ed. 2005) (1886).

²⁵ This is a fundamental distinction between traditional targets of naval operations and air warfare. Cf. Charles H. Dunlap, Jr., *The End of Innocence: Rethinking Noncombatancy in the Post-Kosovo Era*, STRATEGIC REV., Summer 2000, at 16–17; W. Hays Parks, *Air War and the Law of War*, 32 A.F.L. REV. 1, 224–25 (1990).

²⁶ Notably, objections to the use of “war-sustaining” draw on World War II bombings of cities, not naval warfare. See Doswald-Beck, *supra* note 6, at 200; see also Dinstein, *supra* note 5, at 7.

²⁷ See A.T. MAHAN, NAVAL STRATEGY 245–55 (1911).

²⁸ THE MARITIME BLOCKADE OF GERMANY IN THE GREAT WAR: THE NORTHERN PATROL, 1914–18, at 4–5 (John Granger ed., 2003) (outlining British motivation to establish surface blockade of Germany); RICHARD COMPTON-HALL, SUBMARINES AND THE WAR AT SEA, 1914–18, at 194–97 (1991) (German attacks on Allied merchant shipping as reprisal for blockade); see also Albrecht Ritschl, The *Pity of Peace: Germany’s Economy at War, 1914–18 and Beyond*, in THE ECONOMICS OF WORLD WAR I, at 41, 51 (Stephen Broadberry & Mark Harrison eds., 2005) (economic analysis of blockade).

²⁹ COMPTON-HALL, *supra* note 28, at 194–97.

³⁰ *Id.*

³¹ *Id.* at 138–43; *The League of Nations and the Laws of War*, 1 BRIT. Y.B. INT’L L. 109, 112 (1920–1921) (regarding Allied blockade of Germany: “without exception the most important weapon in [World War I] was the starvation by blockade of the whole civilian population in enemy countries”).

³² COMPTON-HALL, *supra* note 28, at 194–97 (German government justified campaign as a reprisal).

liners such as the *Lusitania*, and not over the use of economic warfare, influenced the first twentieth century rules intended to regulate naval warfare against commerce.³³

The 1930 London Treaty, generally a naval arms control treaty, also limited the targeting of merchant vessels.³⁴ It proposed as “established rules of international law” that:

- (1) In their action with regard to merchant ships, submarines must conform to the rules of international law to which surface vessels are subject.
- (2) In particular, except in the case of persistent refusal to stop on being duly summoned, or of active resistance to visit or search, may not sink or render incapable of navigation, a merchant vessel without having first placed passengers, crew and ships papers in a place of safety³⁵

Notably, the agreement did not ban all forms of economic warfare at sea; it only sought to minimize the harm inflicted on mariners.

Perhaps the Allied success in depriving Germany of food and industrial resources through the use of naval blockades restrained the drafters of the London Treaty from imposing greater restrictions on targeting at sea.³⁶ Instead, they chose to mitigate the suffering of ships’ crews or passengers while allowing submarines to target the cargo or the vessel itself. This limited aim failed during World War II when economic warfare at sea reached a new level of excess.³⁷

The humanitarian outcry against submarine warfare in World War I, and the attempt to regulate it with the London Treaties, failed to prevent the re-appearance of unrestricted submarine warfare and other forms of commerce raiding in World War II.³⁸ The effect of naval operations against maritime trade was unprecedented. The goal of the primary proponents of unrestricted submarine warfare, the United States and Nazi Germany, was to disrupt enemy trade and eliminate access to natural resources.³⁹ Submarines targeted merchant vessels without distinction, hoping to deny raw materials for industry and food for civilian populations.⁴⁰

The emphasis on denying industrial raw materials distinguished submarine warfare in World War II from its predecessors. Economic warfare at sea during World War I attempted to starve adversaries into submission.⁴¹ Neither side denied using starvation as a method of warfare.⁴² The belligerents in World War II emphasized more general economic harms. Admiral Karl Dönitz, the senior Nazi naval commander, coined the phrase “Tonnage War” to describe the practice of indiscriminately sinking Allied merchant vessels in order to force Allied industry to replace the vessel.⁴³ The United States

³³ See *id.*; THE MARITIME BLOCKADE OF GERMANY IN THE GREAT WAR, *supra* note 28, at 21–22 (praising psychological effect of “encirclement” in motivating states to join allied cause).

³⁴ Treaty for the Limitation and Reduction of Naval Armament art. 22, Apr. 22, 1930, 22 AM. J. INT’L L. 63 (1931) [hereinafter London Treaty].

³⁵ *Id.*

³⁶ Ritschl, *supra* note 28, at 57–59.

³⁷ The signatories of the 1930 London Treaty failed to ratify it and drafted the 1936 London Treaty as an alternative. See Procès-Verbal Relating to the Rules of Submarine Warfare Set Forth in Part IV of The Treaty of London of April 22, 1930, 31 AM. J. INT’L L. SUPP. 137 (1937). Nonetheless, a number of the signatories (including the United States, Germany and Japan) sought to affirm the restrictions on submarine warfare as customary international law. *Id.* Based on statements contained in the ratification documents of the 1936 London Treaty, the restrictions on submarine warfare remained in effect during World War II. *Id.*

³⁸ See generally 1 SAMUEL ELIOT MORRISON, HISTORY OF THE UNITED STATES NAVAL OPERATIONS IN WORLD WAR II: THE BATTLE OF THE ATLANTIC 1939–1943, at 3–16 (Univ. of Ill. ed. 2001) (1954) (outlining initial use of attacks on maritime trade).

³⁹ MAX HASTINGS, RETRIBUTION: THE BATTLE FOR JAPAN 1944–45, at 279–80 (2007).

⁴⁰ *Id.*

⁴¹ *The League of Nations and the Laws of War*, *supra* note 32, at 112; see also THOMAS H. MIDDLETON, FOOD PRODUCTION IN WAR 12–13 (1923) (explaining influence of food policy and submarine warfare in food supply).

⁴² COMPTON-HALL, *supra* note 28, at 194–97.

⁴³ KARL DÖNITZ, MEMOIRS: TEN YEARS AND TWENTY DAYS 238 (1956).

followed less rigorous logic in the Pacific theater out of desperation at the beginning of the war. However, eventually the United States directed attacks with the hope of collapsing the Japanese economy.⁴⁴

Although the most analyzed attacks on economic resources during World War II involve air power, they illustrate the logic of economic targeting.⁴⁵ The U.S. Army Air Corps staged several raids on industries thought critical to the Nazi military.⁴⁶ It targeted national oil industries, in particular, because economists identified them as “bottlenecks” in the Axis supply chain.⁴⁷ The oil industries served both civilian and military purposes, but were thought to be indispensable to Axis military capabilities.⁴⁸ Despite the sophisticated economic analysis behind such raids, their effectiveness remains debatable.⁴⁹

Attacks on Japan’s shipping industry during World War II produced better results despite the lack of a rigorous economic targeting analysis.⁵⁰ As an island, Japan relied extensively on sea commerce for resources, including oil.⁵¹ The destruction of Japan’s merchant fleet eliminated its access to strategic resources and devastated its industry, hindering its ability to conduct offensive operations.⁵²

Targeting economic resources, however, did not result in more “humane” warfare. Both sides knowingly violated the law of war, indiscriminately targeting vessels, civilians, and other protected persons.⁵³ The trial of Admiral Karl Dönitz at Nuremberg⁵⁴ failed to clarify the limits of the law of war at sea. Moreover, the Nuremberg court’s decision to convict Dönitz of violating international law but not to inflict punishment signaled a grudging acknowledgement of the problem of constraining maritime warfare in international armed conflict.⁵⁵

The tribunal at Nuremberg charged Dönitz with waging “unrestricted submarine warfare contrary to the Naval Protocol of 1936 . . . which reaffirmed the rules of submarine warfare laid down in the London Naval Agreement of 1930.”⁵⁶ The court concluded that he ordered violations of the London Treaties as well as customary international law, but that it would impose no sentence for his direction of the U-boat war. The court reasoned:

In view of all the facts proved . . . and the answers to interrogatories by Admiral Nimitz stating that unrestricted submarine warfare was carried on in the Pacific Ocean by the United States . . . the sentence of Doenitz is not assessed on the ground of his breaches of the international law of submarine warfare.⁵⁷

⁴⁴ Admiral Harold Stark, the Chief of Naval Operations in 1941, ordered attacks on Japan’s merchant shipping with one short phrase: “EXECUTE AGAINST JAPAN UNRESTRICTED AIR AND SUBMARINE WARFARE.” See JOEL IRA HOLWITT, “EXECUTE AGAINST JAPAN”: THE U.S. DECISION TO CONDUCT UNRESTRICTED SUBMARINE WARFARE 1–4 (2009). It reflected the United States’ strategic situation after Pearl Harbor and not a particular strategy. *Id.* Indeed, pre-war U.S. naval doctrine disfavored commerce raiding. *Id.*

⁴⁵ OVERALL ECONOMIC EFFECTS DIV., THE UNITED STATES STRATEGIC BOMBING SURVEY, THE EFFECTS OF STRATEGIC BOMBING ON THE GERMAN WAR ECONOMY 1 (Oct. 31, 1945) [hereinafter GERMAN WAR ECONOMY].

⁴⁶ *Id.* at 67.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *E.g.*, ARTHUR TEDDER, WITH PREJUDICE 502 (1966) (conclusions of former British Air Marshal).

⁵⁰ EUAN GRAHAM, JAPAN’S SEA LANE SECURITY, 1940–2004, at 82 (2006). *But see* Akira Hara, *Japan: Guns Before Rice*, in THE ECONOMICS OF WORLD WAR II, at 224, 264–65 (Mark Harrison ed., 1998) (explaining the role of poorly-reasoned government regulations).

⁵¹ *Id.*

⁵² SAMUEL ELIOT MORRISON, LEYTE: JUNE 1944–JANUARY 1945, at 411–14 (1958).

⁵³ *See, e.g.*, JAMES DEROSA, UNRESTRICTED WARFARE: HOW A NEW BREED OF OFFICERS LED THE SUBMARINE FORCE TO VICTORY IN WORLD WAR II, at 81–95 (2000) (killing of shipwrecked Indian prisoners of war, believed to be Japanese soldiers, by crew of USS *Wahoo*); Trial of Kapitänleutnant Heinz Eck and Four Others (Peleus Case), in 1 LAW REPORTS OF TRIALS OF WAR CRIMINALS SELECTED AND PREPARED BY U.N. WAR CRIMES COMMISSION 9, 15–16 (1947) (rejecting defense of military necessity for killing of shipwrecked merchant sailors, but suggesting that submarine commander could abandon them if tactical situation required).

⁵⁴ 5 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBURG 201–10 (1948).

⁵⁵ INT’L MILITARY TRIALS, NURNBERG, NAZI CONSPIRACY AND AGGRESSION: OPINION & JUDGMENT 138 (W.S. Hein photo. reprint 1996) (1947).

⁵⁶ *Id.*

⁵⁷ *Id.* at 140.

While Dönitz served ten years in prison for crimes related to his role in the Nazi high command, the Nuremberg court failed to address what, if any, restraints could be imposed on economic warfare at sea.⁵⁸

IV. Post-World War II Practice

Few naval engagements of significance occurred after World War II. Fewer still involved the use of submarines, with only the Indo-Pakistan War of 1971 and the Falklands Conflict of 1982 seeing submarines attack warships.⁵⁹ Only the Iran-Iraq War of 1980 to 1988 prompted any significant discussion about targeting non-combatants in naval warfare.⁶⁰

During the so-called “Tanker War” of 1984 to 1986, Iraqi forces targeted oil tankers in an effort to deny Iran the benefit of oil revenues.⁶¹ Iran responded in kind, commencing the largest maritime conflict since World War II.⁶² Indiscriminate attacks on neutrally flagged shipping raised the ire of the international community.⁶³

Iraq’s decision to target tanker traffic in the Persian Gulf echoed earlier maritime campaigns directed against economic targets. Iraqi land offensives failed to gain any strategic advantage, but by denying Iran’s economy income from oil sales Iraq hoped to undermine the effectiveness of the Iranian military.⁶⁴ Indeed, the *Annotated Supplement*’s notion of targets that “indirectly but effectively” support a state’s military describes Iraq’s motivation to attack oil tankers.⁶⁵

However, Iran and Iraq generally ignored the law of war throughout the conflict.⁶⁶ The international community objected to attacks on neutral shipping and suffered from global disruptions of the oil market.⁶⁷ While the practices of the belligerents during the Tanker War echoed earlier naval campaigns, they demonstrated that the international community expects greater discrimination in targeting.

V. Additional Protocol I and Naval Warfare

The signing of Additional Protocol I in 1977 codified many existing laws of armed conflict and introduced a number of novel concepts.⁶⁸ While the entire Protocol is not customary international law, at least in the opinion of U.S. officials and commentators, its restrictions on targeting are widely accepted as authoritative.⁶⁹ Articles 51 and 52 of Additional Protocol I outline a legal framework for protecting the civilian population and infrastructure from military attack in all but a few circumstances.⁷⁰ Article 51 introduces the concept, noting that “[t]he civilian population and individual civilians shall enjoy general protection against dangers arising from military operations.”⁷¹ The majority of the other rules in Additional Protocol

⁵⁸ *Id.* at 141.

⁵⁹ See HECTOR J. DONOHUE, MARITIME LESSONS FROM THE 1971 INDO-PAKISTAN WAR *passim* (1989); Jane Gilliland, *Submarines and Targets: Suggestions for New Codified Rules of Submarine Warfare*, 73 GEO. L. J. 975, 994 (1985).

⁶⁰ See generally TOBY M. ORFORD, THE IRAN-IRAQ WAR: RECENT DEVELOPMENTS IN THE INTERNATIONAL LAW OF NAVAL ENGAGEMENTS 6–9 (1988).

⁶¹ *Id.*; Raphael Danziger, *The Persian Gulf Tanker War*, 111 PROCEEDINGS, No. 5, May 1985, at 160–75.

⁶² Danziger, *supra* note 61, at 160–75.

⁶³ See Francis V. Russo Jr., *Targeting Theory in the Law of Armed Conflict at Sea: The Merchant Vessel as Military Objective in the Tanker War*, in THE GULF WAR OF 1980–1988, at 153, 156–58 (Ige F. Dekker & Harry H.G. Post eds., 1992).

⁶⁴ *Id.*

⁶⁵ ANNOTATED SUPPLEMENT, *supra* note 3, at 402.

⁶⁶ Frits Kalshoven, *Prohibitions or Restrictions on the Use of Methods and Means of Warfare*, in THE GULF WAR OF 1980–88, *supra* note 63, at 97, 107.

⁶⁷ *Id.*

⁶⁸ CLAUDE PILLOUD ET AL., *Introduction to COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949* (1987) [hereinafter COMMENTARY].

⁶⁹ Cf. ANNOTATED SUPPLEMENT, *supra* note 3, at 401–05.

⁷⁰ Protocol I, *supra* note 2, arts. 51, 52.

⁷¹ *Id.* art. 51(1).

I clarify this rule or provide exceptions to it. It allows the direct targeting of civilians only “for such time as they take a direct part in hostilities.”⁷²

Notably, the relationship between Additional Protocol I and naval warfare is not fully developed. Article 49 of Additional Protocol I states:

The provisions of [Additional Protocol I’s restrictions on attacks] apply to any . . . sea warfare which may affect the civilian population, individual civilians or civilian objects on land. They further apply to all attacks from the sea . . . against objectives on land but do not otherwise affect the rules of international law applicable in armed conflict at sea . . .⁷³

The application of Additional Protocol I to naval operations is therefore tied to their effects on civilians on land, essentially a state’s civilian population. The Commentary to Additional Protocol I elaborates on the problem of applying it to naval warfare.⁷⁴ It concedes that:

[T]he conditions of sea warfare were radically transformed during the Second World War and in subsequent conflicts. It is therefore difficult to determine which are the rules that still apply.

. . .

Admittedly both sea and air warfare are subject to treaties of general application . . . but there are hardly any specific rules relating to sea or air warfare, and insofar as they do exist, they are controversial or have fallen into disuse.⁷⁵

Nonetheless, it appears that Additional Protocol I’s targeting regime restricts sea combat.⁷⁶ Both the *Commander’s Handbook* and the *Annotated Supplement* consider much, but not all, of Additional Protocol I’s targeting provisions to reflect customary international law.⁷⁷ The core principles of distinction and proportionality, at minimum, apply to naval warfare. If state practice suggests more restrictive interpretations, then all of Additional Protocol I’s restrictions might apply to naval warfare.

Future attempts to target war-sustaining objects, places or materiel should account for the restrictions codified in Additional Protocol I. It limits military objectives to those objects that, “by their nature, location, purpose, or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”⁷⁸ The Commentary to Article 52 does not define “an effective contribution.”⁷⁹ It notes that “purely civilian objects” can become military objectives while occupied or used by military forces, and that indiscriminate destruction of civilian objects is forbidden.⁸⁰ However, nothing is said of denying a belligerent resources that, while not military in nature, support war-sustaining capabilities.⁸¹

⁷² *Id.* art. 51(3).

⁷³ *Id.* art. 49(3).

⁷⁴ COMMENTARY, *supra* note 68, ¶ 1895 (“In general the delegates at the Diplomatic Convention were guided by a concern not to undertake a revision of the rules applicable to armed conflict at sea . . .”).

⁷⁵ *Id.* ¶¶ 1896–97.

⁷⁶ Robertson, *supra* note 5, at 53–55.

⁷⁷ COMMANDER’S HANDBOOK, *supra* note 4, at 5-3.

⁷⁸ Protocol I, *supra* note 2, art. 52.

⁷⁹ Cf. COMMENTARY, *supra* note 68, ¶¶ 2024–28 (describing contribution in terms of a “definite military advantage” if destroyed).

⁸⁰ *Id.*

⁸¹ *Id.*

Only Article 54 of Additional Protocol I describes what resources a belligerent cannot interdict.⁸² It prohibits the use of starvation as a method of warfare, a provision consistent with other international bans on indiscriminate means and methods of warfare.⁸³ Belligerents cannot deny civilian populations items “indispensable to their survival.”⁸⁴ The nature of “their survival” is unclear, however.

Article 54 would prohibit the use of total blockades or measures directed at civilians alone.⁸⁵ It would not prohibit measures that inconvenience civilians but do not violate basic measures of subsistence. If an attack on a state’s petroleum imports, for example, prevented civilians from using personal vehicles but did not result in a loss of life, there would be no violation of international law. International law does not obligate belligerents to protect civilians from all evils of war, only the most harmful.⁸⁶

VI. Incorporating Discrimination and Proportionality Into Economic Warfare

Despite the silence of international tribunals on the conduct of maritime economic warfare and Additional Protocol I’s limited application to naval warfare, customary international law necessitates incorporating the principle of discrimination. Unless discrimination is incorporated into the targeting of war-sustaining assets, it will have no meaningful future as a military strategy. Targeting economic assets, however, challenges current concepts of discrimination. Civilian and military industries rely on the same economies.⁸⁷ In an age of globalized economies, harm inflicted on one state’s economy will have global consequences.⁸⁸

Generally, the principle of discrimination requires a belligerent to use reasonable means to limit the effects of an attack to military objectives.⁸⁹ If an objective is defined as “war-sustaining,” some nexus to military capability is required. Just as the doctrine of proximate causation limits tort actions by excluding unforeseeable consequences of a breached duty, discrimination excludes targets whose destruction would result in a speculative military advantage.⁹⁰

Overcoming the general prohibition on objectives conferring speculative advantages is the greatest challenge to the legality of attacks on war-sustaining objectives. Determining what advantage attacking a war-sustaining objective will yield is a matter of economic analysis. Even today, the United States safeguards certain natural resources as strategic assets.⁹¹ The “Information Economy” relies on any number of rare minerals or other commodities to function.⁹²

⁸² Protocol I, *supra* note 2, art. 54; *see also id.* arts. 55, 56 (prohibiting the infliction of “long-term and severe damage” on the environment or “works and installations containing dangerous forces”).

⁸³ *Id.* art. 54; *cf.* Convention on the Prohibition of the Use, Stockpiling, Production and Transfer or Anti-Personnel Mines and on Their Destruction, Dec. 3, 1997, 2056 U.N.T.S. 211.

⁸⁴ Protocol I, *supra* note 2, art. 54.

⁸⁵ *Id.*

⁸⁶ *See* COMMENTARY, *supra* note 68, ¶ 1940 (“[T]here is no doubt that acts of violence related to a state of war almost always give rise to some degree of terror among the population . . .”); *see also* Dunlap, *supra* note 25, at 16–17 (arguing that citizens of belligerent states must accept certain hardships of armed conflict).

⁸⁷ The notion of a “military-industrial complex” denies a distinction between civilian and military economies. *See, e.g.*, DWIGHT D. EISENHOWER, PUBLIC PAPERS OF THE PRESIDENTS: DWIGHT D. EISENHOWER, 1953–1960, at 1035–40 (Gov’t. Printing Office ed. 1960).

Now this conjunction of an immense military establishment and a large arms industry is new in the American experience. The total influence—economic, political, even spiritual—is felt in every city, every Statehouse, every office of the Federal government. We recognize the imperative need for this development. Yet we must not fail to comprehend its grave implications. Our toil, resources, and livelihood are all involved. So is the very structure of our society.

Id.

⁸⁸ DAVID CORTRIGHT ET AL., THE SANCTIONS DECADE: ASSESSING U.N. STRATEGIES IN THE 1990S, at 204, 247 (2000).

⁸⁹ Protocol I, *supra* note 2, art. 51(4).

⁹⁰ *Id.*; 57A AM. JUR. 2D. *Negligence* § 431 (1989).

⁹¹ *The Role of Strategic and Critical Minerals in our National and Economic Security: Oversight Hearing Before the Subcomm. on Energy and Mineral Resources*, 108th Cong. 2 (2003) (statement of the Rep. Barbara Cubin, Chairman, H. Subcomm. on Energy and Mineral Resources).

⁹² *See, e.g.*, Dena Montague, *Stolen Goods: Coltan and Conflict in the Democratic Republic of the Congo*, 22 S.A.I.S. REV. 1, 103–18 (2002) (discussing the conflict over coltan production, a mineral essential to most consumer electronics).

Determining what resources a state needs to keep its war effort functioning requires relying on economists and accepting the uncertainty of their methods.⁹³ For example, the *Strategic Bombing Survey* conducted after World War II discredited many of the assumptions about Nazi Germany's economy that directed the Allies' bombing campaigns.⁹⁴ Even after World War II, the United States relied on economic analysis to direct bombing and mining campaigns against Vietnam.⁹⁵ The campaign produced few meaningful results because of an incorrect understanding of Vietnam's economy.⁹⁶ However, the often fallible nature of economic analysis does not render it an illegal source of targeting information.

International law recognizes that commanders must rely on available information, even if it is not absolutely reliable. It does not hold commanders strictly liable for their targeting decisions.⁹⁷ The law obligates commanders to make reasonable, informed decisions about the nature of a proposed target and the expected consequences of an attack.⁹⁸ The Commentary to Additional Protocol I explains a commander's duties, noting:

[T]hose who plan or decide upon . . . an attack will base their decision on information given to them, and they cannot be expected to have personal knowledge of the objective to be attacked and of its exact nature. However, this does not detract from their responsibility, and in case of doubt, even if there is only slight doubt, they must call for additional information The evaluation of the information obtained must include a serious check of its accuracy In fact it is clear that no responsible military commander would wish to attack objectives which were of no military interest. In this respect humanitarian interests and military interests coincide.⁹⁹

Identifying a potential military objective does not require a commander to use a particular source of information or method of analysis. A commander makes a determination based on his subjective belief about the veracity and reliability of available information that a prospective target is a military objective. If the commander chooses to use economic analysis to make a targeting decision, the law is no obstacle.

If a military objective is identified through economic analysis, its destruction cannot result in indiscriminate effects.¹⁰⁰ Attacking a war-sustaining resource with dual civilian-military uses, such as natural gas production, might have widespread effects throughout a society. If a lack of natural gas during winter causes a humanitarian crisis such as civilians freezing to death, the attack may be indiscriminate. However, widespread effects are not always indiscriminate effects. Discrimination is a matter of circumstance, dependent on the weapon used and the context of its use.¹⁰¹ A commander would need to determine if attacking an economic resource would actually diminish a belligerent's military capability, or if it would cause uncontrollable effects throughout a society and must be halted.¹⁰²

Where a commander wishes to attack a war-sustaining target with the intent to achieve effects throughout an economic system, the line between discriminate and indiscriminate attacks becomes blurred. The strategy of a Tonnage War employed in World War II provides an example.¹⁰³ Studies of the shipping industry conducted after World War I found that attacks on

⁹³ Tor Egil Førland, *The History of Economic Warfare: International Law, Effectiveness, Strategies*, 30 J. OF PEACE RES. 2, 159–60 (1993).

⁹⁴ GERMAN WAR ECONOMY, *supra* note 45, at 11–16.

⁹⁵ Then-Secretary of Defense Robert S. McNamara served as an economist on the Strategic Bombing Survey. JOHN PRADOS, VIETNAM 160 (2009); GEORGE C. HERRING, AMERICA'S LONGEST WAR: THE UNITED STATES AND VIETNAM, 1950–1975, at 148–50, 241–43 (1979).

⁹⁶ HERRING, *supra* note 95, at 149.

⁹⁷ *E.g.*, United States v. List (Hostages Case), in 11 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBURG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 1296 (1950) (“If the facts were such as would justify the action by the exercise of judgment, after giving consideration to all the factors and existing possibilities, even though the conclusion reached may have been faulty, it cannot be said to be criminal.”).

⁹⁸ *Id.*

⁹⁹ COMMENTARY, *supra* note 68, ¶ 2195.

¹⁰⁰ Protocol I, *supra* note 2, art. 51(4).

¹⁰¹ COMMENTARY, *supra* note 68, ¶ 1961–63.

¹⁰² Protocol I, *supra* note 2, art. 52.

¹⁰³ DÖNITZ, *supra* note 43, at 238.

merchant shipping strained the shipbuilding industry and disrupted a nation's entire maritime supply chain.¹⁰⁴ The destruction of a single ship, regardless of its cargo or destination, would force a belligerent to incur the expense of replacing the ship and accounting for the loss of logistical capability.¹⁰⁵ Even damaging the vessel could delay the transport of military supplies and interfere with operations.¹⁰⁶

However, the extent of an attack's effects throughout a supply chain cannot always be predicted with certainty. Experience with the U.N.'s economic sanctions in the 1990s demonstrated that even careful analysis of a target nation's economy cannot ascertain all long-term effects.¹⁰⁷ Targeting any economic resource or other war-sustaining asset will result in unforeseen consequences. Commanders have the duty to ascertain if those consequences are reasonably predictable and controllable.¹⁰⁸ How well a particular economic analysis meets that duty is a matter of commander's discretion.

If a naval force could launch a discriminate attack on a state's war-sustaining resources, the attack would need to be proportional to the military advantage gained.¹⁰⁹ In other words, the expected loss of civilian life could not exceed the expected military gain. The broad nature of war-sustaining targets could encompass two groups of civilians likely to die from attacks on war-sustaining targets: merchant mariners and civilians ashore. Merchant mariners would certainly suffer if materials are targeted at sea.¹¹⁰ While international humanitarian law categorizes merchant mariners as civilians, their close association with the military is noted in domestic and international law.¹¹¹ Potentially, if merchant mariners shipped aboard armed vessels, they would qualify as combatants.¹¹² Merchant mariners aboard unarmed vessels providing a belligerent with war-sustaining materials, however, would occupy the same position as contractors transporting munitions on the battlefield.¹¹³ They could not be targeted directly, but their proximity to legitimate targets places them at great risk.¹¹⁴

Unlike the direct threat of death or injury faced by merchant mariners onboard the targeted vessels, civilians ashore might suffer from the indirect effects of targeting war-sustaining resources. Nonetheless, the U.N. Charter permits the U.N. Security Council to impose economic sanctions on states that threaten international security.¹¹⁵ Sanctions against Iraq and North Korea harmed large segments of their economies effecting the civilian population.¹¹⁶ The embargo against Iraq was particularly harsh, increasing the Iraqi infant mortality rate and generally degrading civilian welfare.¹¹⁷ Nonetheless, it remained a legal, enforceable action.

¹⁰⁴ Several notable figures of twentieth century economic thought, including John Maynard Keynes, contributed to the study as part of a project by the Carnegie Endowment to analyze the economic and social history of World War I. CHARLES ERNEST FAYLE, THE WAR AND THE SHIPPING INDUSTRY 401–03 (1927).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ CORTRIGHT, ET AL., *supra* note 88, at 247–49 (noting inability to predict second or third order effects of even limited sanctions imposed during peacetime).

¹⁰⁸ Cf. Protocol I, *supra* note 2, art. 51(4).

¹⁰⁹ *Id.* art. 57.

¹¹⁰ Shipwrecked members of the merchant marine are protected persons, and must be “respected and protected.” Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea arts. 12, 13(5), Aug 12, 1949, 6 U.S.T. 3317, 75 U.N.T.S. 85.

¹¹¹ However, they would not qualify as combatants unless directly engaging in hostilities. See Geneva Convention Relative to the Treatment of Prisoners of War art. 4(5), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (conferring POW status on merchant mariners); Schumacher v. Aldridge, 665 F. Supp. 41, 46 (D.D.C. 1987) (finding merchant mariners equivalent to military personnel for benefits purpose).

¹¹² See San Remo Manual on International Law Applicable to Armed Conflicts at Sea, sec. IV, art. 60, 12 June 1994 (INT'L REV. OF THE RED CROSS No. 309, at 595–637 (1995)).

¹¹³ See, e.g., Michael N. Schmitt, *The Principle of Discrimination in 21st Century Warfare*, 2 YALE HUM. RTS. & DEV. L.J. 143, 160 (1999).

¹¹⁴ *Id.*

¹¹⁵ U.N. Charter art. 41.

¹¹⁶ S.C. Res. 1718, ¶ 8, U.N. Doc. S/RES/1718 (Oct. 14, 2006) (economic sanctions against North Korea); S.C. Res. 687, ¶ 21, U.N. Doc. S/RES/687 (Apr. 8, 1991) (embargo against Iraq).

¹¹⁷ David Cortright, *A Hard Look at Iraq Sanctions*, NATION (Dec. 3, 2001), available at <http://www.thenation.com/doc/20011203/cortright>.

The consequences of enforcing U.N. economic sanctions set a high legal standard for what indirect harm a civilian population might have to suffer before the sanctions violate international law.¹¹⁸ If economic sanctions, by definition a measure short of armed conflict, can negatively affect civilian welfare to the point that a state's mortality rate increases, *a fortiori* a state could inflict similar harm on a civilian population during wartime. Thus, the standard for determining when an attack on a war-sustaining asset is disproportional to its military value is no different than any other attack. All targeting decisions require commanders to balance a specified number of civilian deaths with an expected military gain.¹¹⁹

VII. Conclusion

While economic warfare at sea remains a legal strategy, developments in international law restrict its use. Contemporary international law prohibits attempts to starve nations into submission. Likewise, indiscriminate attacks of the sort carried out by submarine forces in World War I and World War II are likely illegal. Instead, war-sustaining targets should be defined according to careful economic analysis of a belligerent's military and industrial capacity.¹²⁰ Modern economic sanctions take a similar approach and are generally legal. The targeting analysis in this scenario is economic analysis, but it will account for discrimination and proportionality. Unduly speculative war-sustaining targets or those with a tenuous relationship to a state's war fighting capability should be excluded.¹²¹

Considering the historical practice of naval forces and contemporary international law, the practice of targeting war-sustaining economic targets remains legal. International law, however, expects commanders to exercise greater discrimination in targeting than in the past. Proper economic analysis of a proposed target's role in supporting a state's war-fighting industry should meet the standard expected of commanders before an attack is initiated.¹²²

Finally, the *Commander's Handbook* requires updating. Its definition of a war-sustaining target should explain the concept in the context of traditional, maritime targeting of material resources supported by state practice. Properly articulating a definition of war-sustaining targets will affirm their legality and continuing relevance to naval strategy.¹²³

¹¹⁸ Cf. GARY CLYDE HUFBAUER ET AL., ECONOMIC SANCTIONS RECONSIDERED 138–47 (3d ed. 2007) (describing various multilateral and unilateral sanctions and their wide-ranging effects).

¹¹⁹ However, some view sanctions as occupying a “grey area between humanitarian law and the rules of warfare [sic].” CORTRIGHT ET AL., *supra* note 88, at 246.

¹²⁰ Essentially the same analysis used in imposing sanctions under U.N. authority. See R. T. TAYLOR, ECONOMIC WARFARE 2–3, 18–19 (2001).

¹²¹ See ASKARI ET AL., *supra* note 16, at 190–93 (proposed economic analysis for targeting sanctions).

¹²² Cf. TAYLOR, *supra* note 120, at 18–19 (problem of figuring out what is a strategic resource).

¹²³ Recent scholarship by the International Committee of the Red Cross treats public statements of what the law of war should be as sources of customary international law. This view is not universally held, but it underscores the need to accurately articulate explanations of the law of war. See, e.g., Major J. Jeremy Marsh, *Lex Lata or Lex Ferenda? Rule 45 of the ICRC Study on Customary International Humanitarian Law*, 198 MIL. L. REV. 116, 119 (2009).

Book Review

STANDARD OPERATING PROCEDURE¹

REVIEWED BY MAJOR KENNETH BACSO²

I. Introduction

Based primarily on interviews with Soldiers and other personnel with direct knowledge and involvement at Abu Ghraib, *Standard Operating Procedure* examines the context surrounding the infamous photographs that emerged from the American-run prison in Iraq. The authors of *Standard Operating Procedure* look beyond the photographs; there are not even any pictures in the book.³ Instead, the point is to “see the story afresh” and “describe the experience of the American soldiers at the prison.”⁴

The story of Abu Ghraib in *Standard Operating Procedure* is every bit as troubling as the photographs, but it is different than the story told by the photographs alone. In *Standard Operating Procedure*, the reader learns that some of the most disturbing photographs are simply of Soldiers doing their jobs. Of course, other photos also depict Soldiers engaging in shocking acts that are simply criminal. However, even these acts did not occur in a vacuum. The incidents the photographs portrayed happened in the context of a surreal environment, void of adequate rules, void of courageous leadership, and void of discipline.

This review first examines the research and documentation in *Standard Operating Procedure*. It assesses the authors’ knowledge of the military, and how they address the military. Then, this review discusses the central thesis of the book with respect to Abu Ghraib, that “photographs cannot tell stories. They can only provide evidence of stories, and evidence is mute; it demands investigation and interpretation.”⁵ Finally, this review examines the legal context of what happened at Abu Ghraib and discusses lessons it contains for Judge Advocates (JAs).

Standard Operating Procedure offers a unique perspective on what happened at Abu Ghraib beyond the photographs, and it successfully induces the reader into interpretation and self-reflection concerning the events before, during, and after the moments in time the photographs represent.

II. Documentation and Sourcing

Standard Operating Procedure is primarily based on interviews with approximately twenty-six individuals who had personal experiences of Abu Ghraib in 2003 and 2004.⁶ One of the authors conducted the interviews himself, thereby significantly adding to the body of information available about the prison.⁷ The interviews were also the basis for a documentary film bearing the same name.⁸

In addition to their own source material, the authors attempted to “corroborate individual accounts against one another and against external documents.”⁹ These documents include those that have become publically available, such as an investigation conducted by Major General (MG) Antonio Taguba into activities of the 800th Military Police Brigade in

¹ PHILIP GOUREVITCH & ERROL MORRIS, STANDARD OPERATING PROCEDURE (2008).

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³ Many of the photographs are widely available on the internet. See, e.g., Joan Walsh, *The Abu Ghraib Files*, SALON, Mar. 15, 2006, http://www.salon.com/news/abu_ghraib/2006/03/14/introduction/ (containing 279 photographs and 19 videos).

⁴ GOUREVITCH & MORRIS, *supra* note 1, at 283.

⁵ *Id.* at 148.

⁶ *Id.* at 284.

⁷ *Id.*

⁸ STANDARD OPERATING PROCEDURE (Sony Pictures Classics 2008).

⁹ GOUREVITCH & MORRIS, *supra* note 1, at 284.

Iraq.¹⁰ Although written for a different purpose, the narrative in *Standard Operating Procedure* seems largely consistent with that investigation and those that followed.¹¹ Although it could be argued that the interviews given for this book are self-serving, the authors' efforts to corroborate the facts enhance the plausibility of the narrative.

The authors also gained access to transcripts of U.S. Army Criminal Investigation Division interviews with several other individuals whom the authors did not interview directly, including the Staff Judge Advocate for Combined Task Force 7.¹² The most interesting documents the authors cite are the letters written by Specialist (SPC) Sabrina Harman while she was at Abu Ghraib.¹³ The authors quote these letters at length throughout the book. Assuming these letters are authentic, they provide a unique, contemporaneous account of what occurred that lends particular credibility to the subsequent interviews that are the primary sources for the book.

Although *Standard Operating Procedure* is well sourced, the research itself is not well documented. The book lacks an index and footnotes. This needlessly limits the credibility of the book and makes it more difficult for readers to build upon the research conducted by the authors. Although the authors succeed in telling the story of Abu Ghraib, their journalism could have produced a record of much greater historical value had it been thoroughly documented.¹⁴

III. Perspective on the Military

The credibility of the authors is diminished when on a few occasions they demonstrate an incomplete understanding of the military. For example, they note that one of the key figures at Abu Ghraib, Corporal (CPL) Charles Graner, had a "Military Occupational Structure" of "71L, a low rating, which meant he lacked the basic security clearance to wear an MP armband."¹⁵ One Military Occupational *Specialty* is not lower than another.¹⁶ On other occasions, the authors refer to noncommissioned officers simply as officers, such as when they describe Staff Sergeant Frederick as "more of a go-along-and-get-along officer than a natural leader."¹⁷ Although not particularly serious, such mistakes open the authors up to criticism that they do not possess a working knowledge of the military. This could affect their analysis of the relationships between the Soldiers in the book, and their understanding of command responsibility. At the very least, the authors should have sought editorial review from somebody with a military background.

Although the authors may not have a strong knowledge of the military, their tone toward the military was appropriate and fair. Certainly, they criticized the military to the point of exasperation on a few occasions, such as when they note: "no soldier above the rank of sergeant ever served jail time."¹⁸ Nevertheless, they generally succeeded in focusing on simply telling the complete story of Abu Ghraib in a factual yet insightful way. As they say during a short interlude in the story: "There is a constant temptation, when rendering an account of history, to distort reality by making too much sense of it."¹⁹ The authors mostly tell the story without an overt agenda, and leave it to the reader to make sense of it.

IV. A Picture Is Not Worth A Thousand Words

Despite any minor weaknesses, the authors succeed at telling the story of Abu Ghraib in a captivating way. In particular, they shed light on several of the published photographs. For example, one of the most infamous photographs coming from

¹⁰ *Id.* at 251; see Major General Anthony Taguba, Army Regulation 15-6 Investigation of the 800th Military Police Brigade (3 Mar. 2004) [hereinafter MG Taguba, AR 15-6 Investigation], available at <http://news.findlaw.com/hdocs/docs/iraq/tagubarpt.html>.

¹¹ See, e.g., Major General George R. Fay, Army Regulation 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade (23 Aug. 2004), available at <http://news.findlaw.com/hdocs/docs/dod/fay82504rpt.pdf>.

¹² GOUREVITCH & MORRIS, *supra* note 1, at 285.

¹³ See, e.g., *id.* at 71.

¹⁴ There is an abundance of raw material already available about Abu Ghraib. See, e.g., THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB (Karen J. Greenberg & Joshua L. Dratel eds., 2006) (containing more than 1200 pages of documents).

¹⁵ GOUREVITCH & MORRIS, *supra* note 1, at 118.

¹⁶ See U.S. DEP'T OF ARMY, REG. 611-1, MILITARY OCCUPATIONAL CLASSIFICATION STRUCTURE DEVELOPMENT AND IMPLEMENTATION (30 Sept. 1997).

¹⁷ GOUREVITCH & MORRIS, *supra* note 1, at 119.

¹⁸ *Id.* at 270.

¹⁹ *Id.* at 159.

Abu Ghraib is of a female Soldier, Private (PVT) Lynndie England, leading an Iraqi detainee along by what appears to be a leash.²⁰ Although this photograph may retain importance as a symbol, the authors succeed in making it just a snapshot, a single moment in time. The real issue is what happened before and after the photo was taken.

As reported in *Standard Operating Procedure*, there is a context to the seemingly inexplicable photo of PVT England. The context does not excuse PVT England or any of the other Soldiers involved. However, in this particular instance, these Soldiers needed to move an uncooperative detainee who had open sores.²¹ The Soldiers lacked training for such a task, and they lacked equipment.²² Corporal Graner improvised with a cargo strap that looked like a leash.²³ As one witness, SPC Megan Ambuhl said: “That was an uncooperative detainee who needed to get out of that cell—a guy with sores and stuff. You’re not going to touch him. You get him out, and it may have been unorthodox, but he didn’t hurt anybody and he didn’t get hurt.”²⁴

No doubt, this was the wrong solution. At the same time, Soldiers faced with a real-world problem improvised to accomplish the mission. As *Standard Operating Procedure* makes clear throughout that incidents such as this happened at Abu Ghraib every day. When MG Geoffrey Miller visited Abu Ghraib, he reportedly said: “You have to treat the prisoners like dogs.”²⁵

In fact, most of the photographs that came from Abu Ghraib are merely fragments of the daily reality that was imposed upon the Soldiers there: the nakedness,²⁶ the detainees handcuffed in stress positions,²⁷ the female underwear.²⁸ This was apparently standard operating procedure, and widely known among the chain of command, at least according to the Soldiers at Abu Ghraib.²⁹ According to SPC Ambuhl, “our job was to stress out the detainees, and help facilitate information to the interrogators, and save the lives of other soldiers out there.”³⁰ Specialist Ambuhl also is quoted as saying that without the pressure from military intelligence, “the detainees would have been in their cells, and we would have been in the office watching a movie or drinking coffee.”³¹ That certainly would have been easier for the Soldiers.

This is not to say that *Standard Operating Procedure* is a defense of the Soldiers in the photographs. It is not. Clearly, there are occasions when the Soldiers sunk to new depths of immorality and indiscipline. For example, one photograph depicted detainees who were “stacked atop one another in a human pyramid, posed to simulate oral sex, lined up against a wall, and made to masturbate—and none of the MPs who took part in this unhinged variety show could come up with an excuse for it.”³² Even in this case, however, *Standard Operating Procedure* succeeds in providing a context for how such criminal activity could occur. This understanding is valuable to the reader, and is the essence of what makes this book fascinating and consequential. The authors sum it up nicely when they say that the stain of Abu Ghraib “is inescapable and irreversible, and it is ours, and if we have any hope of containing it and living it down it can only come from seeing it whole.”³³

²⁰ *Id.* at 138.

²¹ *Id.* at 141.

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 142 (quoting SPC Ambuhl).

²⁵ *Id.* at 48 (according to a statement by Brigadier General Kapinski).

²⁶ *Id.* at 87 (describing the arrival of the unit to Abu Ghraib for the first time and seeing all the prisoners naked).

²⁷ *Id.* at 101.

²⁸ *Id.* at 97 (“There was a big cardboard carton of panties in the supply cell on Tier 1A, each pair in a plastic slip cover.”). The reader wonders how the supply personnel justified this purchase on paper.

²⁹ See *id.* at 165 (quoting SPC Ambuhl: “At the time, everyone in our chain of command said that was OK. The questions were asked and answered. So after that, what do you do?”).

³⁰ *Id.* at 92 (quoting SPC Ambuhl).

³¹ *Id.* at 157 (quoting SPC Ambuhl).

³² *Id.* at 187.

³³ *Id.* at 160.

V. A Legal Context for Abuse

The legal context for what happened at Abu Ghraib is one of many contexts explored by the authors in an effort to tell the whole story of Abu Ghraib. For the JA, this is one of the most important themes in the book. The authors identify at least three significant legal failures. First, the legal status of detainees in Iraq was unclear. Second, the approved techniques for interrogation were both inappropriate and constantly changing. Finally, there was no standard operating procedure for detention operations at Abu Ghraib.

The authors describe the confusion that existed concerning the status of detainees in Iraq. The Geneva Convention Relative to the Treatment of Prisoners of War (GC III) “presumes a conventional war between the armies of sovereign states.”³⁴ The counterinsurgency that the United States faced in Iraq after major combat operations had ended was not a conventional war. The prisoners of Abu Ghraib were considered security detainees, and fell instead under the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (GC IV), affording the detainees fewer rights than enemy prisoners of war.³⁵ Regardless of whether or not this was the appropriate status for the detainees, the perception among Soldiers and even senior leaders was that “the gloves [were] coming off.”³⁶

Facing pressure to obtain actionable intelligence, the legal standards at Abu Ghraib for interrogations were frequently shifting and excessively permissive.³⁷ The authors paint a good picture of the confusing scene. There were apparently “five different versions of the interrogation rules” that applied to Abu Ghraib in one month alone.³⁸

Whatever the rules actually were at Abu Ghraib, they were not in accordance with traditional Army doctrine for interrogation operations.³⁹ At the time, intelligence interrogation in the Army was governed by a Field Manual 34-52.⁴⁰ Published in 1993, it “builds upon existing doctrine and moves interrogation into the 21st century.”⁴¹ Yet instead of grounding rules in this Army doctrine, Abu Ghraib’s “interrogation rules were not really rules but a kind of guesswork.”⁴²

To make matters worse, there were no standard operating procedures for the military police responsible for handling the detainees.⁴³ The authors report that MG Geoffrey Miller provided a copy of the very detailed standard operating procedures used at Guantanamo Bay to the headquarters of Lieutenant General Ricardo Sanchez.⁴⁴ Apparently, nothing came of that.⁴⁵ Certainly, a leader at some level should have stepped forward and implemented basic standard operating procedures. In any case, as the authors quote SPC Ambuhl as saying: “They couldn’t say that we broke the rules because there were no rules.”⁴⁶

³⁴ *Id.* at 27; *see* Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

³⁵ GOUREVITCH & MORRIS, *supra* note 1, at 33; *see* Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. The authors criticize the determination that GC IV should apply to the detainees at Abu Ghraib. GOUREVITCH, *supra* note 1, at 33. However, the also seem to recognize the limitations of GC III in a counterinsurgency environment. *See* GOUREVITCH & MORRIS, *supra* note 1, at 27.

³⁶ GOUREVITCH & MORRIS, *supra* note 1, at 41 (quoting an e-mail sent from Captain William Ponce to military intelligence unit commanders in Iraq).

³⁷ *Id.* at 51.

³⁸ *Id.* at 53.

³⁹ *Id.* at 39.

⁴⁰ U.S. DEP’T OF ARMY, FIELD MANUAL 34-52, INTELLIGENCE INTERROGATION (28 Sept. 1992) [hereinafter FM 34-52]. Field Manual 34-52 once again became the standard for all Army interrogations upon the passage of the Detainee Treatment Act of 2005: “No person in the custody or under the effective control of the Department of Defense or under detention in a Department of Defense facility shall be subject to any treatment or technique of interrogation not authorized by and listed in the United States Army Field Manual on Intelligence Interrogation.” Pub L. No. 109-148, 119 Stat. 2680. Field Manual 34-52 has since been replaced by FM 2-22.3. U.S. DEP’T OF ARMY, FIELD MANUAL 2-22.3, HUMAN INTELLIGENCE COLLECTOR OPERATIONS (6 Sept. 2006).

⁴¹ FM 34-52, *supra* note 40, at iv.

⁴² GOUREVITCH & MORRIS, *supra* note 1, at 54.

⁴³ *Id.* at 92; MG Taguba AR 15-6 Investigation, *supra* note 10, at 43 (“Brigade and unit SOPs for dealing with detainees if they existed at all, were not read or understood by MP Soldiers assigned the difficult mission of detainee operations.”).

⁴⁴ GOUREVITCH & MORRIS, *supra* note 1, at 90.

⁴⁵ *Id.* at 91.

⁴⁶ *Id.* at 92 (quoting SPC Ambuhl).

VI. Lessons for the Judge Advocate

The JA reading *Standard Operating Procedure* faces some meaningful lessons and an opportunity for self-reflection. Of course, our work must be thorough and precise.⁴⁷ In this respect, if *Standard Operating Procedure* is accurate, the JAs serving Abu Ghraib failed to ensure that the multiple policies put out were accurate, clear, and understood.

More fundamentally, as legal professionals, we must stand up for the rules, even when it is not the easy thing to do.⁴⁸ Although he may have a motive to fabricate, CPL Graner claimed that there were two JAs at Abu Ghraib on nearly a daily basis and they saw naked detainees, “people out on the floor getting PT’d, prisoners hanging from the doors.”⁴⁹ According to Graner, they did not challenge what was happening.⁵⁰ Therefore, he believed “that this all was OK because here’s a JAG person, and he doesn’t seem to see that there’s anything wrong with this.”⁵¹ The JAs may or may not have seen as much as CPL Graner thinks. The lesson, however, is the same: Soldiers expect that JAs will not only know the rules, but also stand up for them.

VII. Conclusion

Standard Operating Procedure succeeds in its goal of telling the story of Abu Ghraib beyond the photographs that have made it one of the most significant events of the Iraq war. That was the goal of the authors, and in that respect, they succeed. However, they recognize that there is more to Abu Ghraib when they quote Sergeant Ken Davis: “Once you dig your hands into Abu Ghraib, you don’t come out the same. There’s a part of you that either died, or that is totally confused.”⁵²

The conscientious reader will hear a consequential story, but may also be confused. The reader will begin to ask questions: How would I have handled the situation? What lessons can I learn? How can we prevent this from happening again? Although *Standard Operating Procedure* does not provide the answers to those difficult questions, the fact that it causes one to consider these issues makes it a meaningful and worthwhile piece of reading.

⁴⁷ U.S. DEP’T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS para. 6.c (1 May 1992) (“In all professional functions, a lawyer should be competent, prompt, diligent, and honest.”).

⁴⁸ *Id.* para. 6d (“While it is a lawyer’s duty, when necessary, to challenge the rectitude of official action, it is also a lawyer’s duty to uphold legal process.”).

⁴⁹ GOUREVITCH & MORRIS, *supra* note 1, at 166.

⁵⁰ *Id.*

⁵¹ *Id.* at 167.

⁵² *Id.* at 159, back cover.

CLE News

1. Resident Course Quotas

a. Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's Legal Center and School, U.S. Army (TJAGLCS), is restricted to students who have confirmed reservations. Reservations for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated training system. If you do not have a confirmed reservation in ATRRS, attendance is prohibited.

b. Active duty service members and civilian employees must obtain reservations through their directorates training office. Reservists or ARNG must obtain reservations through their unit training offices or, if they are non-unit reservists, through the U.S. Army Personnel Center (ARPERCOM), ATTN: ARPC-OPB, 1 Reserve Way, St. Louis, MO 63132-5200.

c. Questions regarding courses should be directed first through the local ATRRS Quota Manager or the ATRRS School Manager, Academic Department at 1 (800) 552-3978, extension 3307.

d. The ATRRS Individual Student Record is available on-line. To verify a confirmed reservation, log into your individual AKO account and follow these instructions:

Go to Self Service, My Education. Scroll to Globe Icon (not the AARTS Transcript Services). Go to ATRRS On-line, Student Menu, Individual Training Record. The training record with reservations and completions will be visible.

If you do not see a particular entry for a course that you are registered for or have completed, see your local ATRRS Quota Manager or Training Coordinator for an update or correction.

e. The Judge Advocate General's School, U.S. Army, is an approved sponsor of CLE courses in all states that require mandatory continuing legal education. These states include: AL, AR, AZ, CA, CO, CT, DE, FL, GA, ID, IN, IA, KS, KY, LA, ME, MN, MS, MO, MT, NV, NH, NM, NY, NC, ND, OH, OK, OR, PA, RI, SC, TN, TX, UT, VT, VA, WA, WV, WI, and WY.

2. TJAGLCS CLE Course Schedule (2009—September 2010) (<http://www.jagenet.army.mil/JAGCNETINTERNET/HOME PAGES/AC/TJAGSAWEB.NSF/Main?OpenFrameset> (click on Courses, Course Schedule))

ATTRS. No.	Course Title	Dates
GENERAL		
5-27-C22	58th Judge Advocate Officer Graduate Course	10 Aug 09 – 20 May 10
5-27-C22	59th Judge Advocate Officer Graduate Course	16 Aug 10 – 26 May 11
5-27-C20	179th JAOBC/BOLC III (Ph 2)	17 Jul – 30 Sep 09
5-27-C20	180th JAOBC/BOLC III (Ph 2)	6 Nov 09 – 3 Feb 10
5-27-C20	181st JAOBC/BOLC III (Ph 2)	19 Feb – 5 May 10
5-27-C20	182d JAOBC/BOLC III (Ph 2)	16 Jul – 29 Sep 10
5F-F1	209th Senior Officer Legal Orientation Course	19 – 23 Oct 09
5F-F1	210th Senior Officer Legal Orientation Course	25 – 29 Jan 10
5F-F1	211th Senior Officer Legal Orientation Course	22 – 26 Mar 10
5F-F1	212th Senior Officer Legal Orientation Course	14 – 18 Jun 10
5F-F1	213th Senior Officer Legal Orientation Course	30 Aug – 3 Sep 10
5F-F3	16th RC General Officer Legal Orientation Course	10 – 12 Mar 10

5F-F5	Congressional Staff Legal Orientation (COLO)	18 – 19 Feb 10
5F-JAG	2009 JAG Annual CLE Workshop	5 – 9 Oct 09
JARC-181	Judge Advocate Recruiting Conference	21 – 23 Jul 10
5F-F52	40th Staff Judge Advocate Course	7 – 11 Jun 10
5F-F52S	13th SJA Team Leadership Course	7 – 9 Jun 10
5F-F55	2010 JAOAC	4 – 15 Jan 10
5F-F70	Methods of Instruction	22 – 23 Jul 10

NCO ACADEMY COURSES

5F-F301	27D Command Paralegal Course	1 – 5 Feb 10
600-BNCOC	6th BNCOC Common Core (Ph 1)	3 – 21 Aug 09 Cancelled
512-27D30	6th Paralegal Specialist BNCOC (Ph 2)	26 Aug – 30 Sep 09
512-27D30	1st Paralegal Specialist BNCOC (Ph 2)	19 Oct – 24 Nov 09
512-27D30	2d Paralegal Specialist BNCOC (Ph 2)	4 Jan – 9 Feb 10
512-27D30	3d Paralegal Specialist BNCOC (Ph 2)	4 Jan – 9 Feb 10
512-27D30	4th Paralegal Specialist BNCOC (Ph 2)	8 Mar 10 Apr 10
512-27D30	5th Paralegal Specialist BNCOC (Ph 2)	17 May – 22 Jun 10
512-27D30	6th Paralegal Specialist BNCOC (Ph 2)	12 Jul – 17 Aug 10
512-27D40	4th Paralegal Specialist ANCOC (Ph 2)	26 Aug – 30 Sep 09
512-27D40	1st Paralegal Specialist ANCOC (Ph 2)	19 Oct – 24 Nov 09
512-27D40	2d Paralegal Specialist ANCOC (Ph 2)	8 Mar – 13 Apr 10
512-27D40	3r Paralegal Specialist ANCOC (Ph 2)	17 May – 22 Jun 10
512-27D40	4th Paralegal Specialist ANCOC (Ph 2)	12 Jul – 17 Aug 10

WARRANT OFFICER COURSES

7A-270A1	21st Legal Administrators Course	14 – 18 Jun 10
7A-270A0	17th JA Warrant Officer Basic Course	24 May – 18 Jun 10
7A-270A2	10th JA Warrant Officer Advanced Course	6 – 31 Jul 09
7A-270A2	11th JA Warrant Officer Advanced Course	5 – 30 Jul 10
7A-270A3	10th Senior Warrant Officer Symposium	1 – 5 Feb 10

ENLISTED COURSES

512-27D/20/30	21st Law for Paralegal NCO Course	22 – 26 Mar 10
512-27D-BCT	12th 27D BCT NCOIC/Chief Paralegal NCO Course	19 – 23 Apr 10
512-27DC5	30th Court Reporter Course	27 Jul – 25 Sep 09
512-27DC5	31st Court Reporter Course	25 Jan – 26 Mar 10
512-27DC5	32d Court Reporter Course	19 Apr – 18 Jun 10
512-27DC5	33d Court Reporter Course	26 Jul – 24 Sep 10

512-27DC6	9th Senior Court Reporter Course	14 – 18 Jul 09
512-27DC6	10th Senior Court Reporter Course	12 – 16 Jul 10
512-27DC7	12th Redictation Course	4 – 15 Jan 10
512-27DC7	13th Redictation Course	29 Mar – 9 Apr 10

ADMINISTRATIVE AND CIVIL LAW

5F-F21	7th Advanced Law of Federal Employment Course	26 – 28 Aug 09
5F-F22	62d Law of Federal Employment Course	24 – 28 Aug 09
5F-F22	63d Law of Federal Employment Course	23 – 27 Aug 10
5F-F23	65th Legal Assistance Course	26 – 30 Oct 09
5F-F23E	2009 USAREUR Client Services CLE Course	2 – 6 Nov 09
5F-F24	34th Administrative Law for Military Organizations	15 – 19 Mar 10
5F-F24E	2010 USAREUR Administrative Law CLE	13 – 17 Sep 10
5F-F28	2009 Income Tax Law Course	7 – 11 Dec 09
5F-F28E	2009 USAREUR Tax CLE Course	30 Nov – 4 Dec 09
5F-F28H	2010 Hawaii Income Tax CLE Course	11 – 15 Jan 10
5F-F28P	2010 PACOM Income Tax CLE Course	5 – 8 Jan 10
5F-F29	27th Federal Litigation Course	3 – 7 Aug 09
5F-F29	28th Federal Litigation Course	2 – 6 Aug 10
5F-F202	8th Ethics Counselors Course	12 – 16 Apr 10

CONTRACT AND FISCAL LAW

5F-F10	162d Contract Attorneys Course	20 – 31 Jul 09
5F-F10	163d Contract Attorneys Course	19 – 30 July 10
5F-F11	2009 Government Contract Law Symposium	17 – 20 Nov 09
5F-F12	81st Fiscal Law Course	14 – 18 Dec 09
5F-F14	28th Comptrollers Accreditation Fiscal Law Course	7 – 11 Dec 09
5F-F101	9th Procurement Fraud Advisors Course	10 – 14 May 10

CRIMINAL LAW

5F-F301	13th Advanced Advocacy Training Course	1 – 4 Jun 10
5F-F31	15th Military Justice Managers Course	24 – 28 Aug 09
5F-F31	16th Military Justice Managers Course	23 – 27 Aug 10
5F-F33	53d Military Judge Course	19 Apr – 7 May 10
5F-F34	32d Criminal Law Advocacy Course	14 – 25 Sep 09
5F-F34	33d Criminal Law Advocacy Course	1 – 12 Feb 10
5F-F34	34th Criminal Law Advocacy Course	13 – 24 Sep 10
5F-F35	33d Criminal Law New Developments Course	2 – 5 Nov 09
5F-F35E	2010 USAREUR Criminal Law CLE	11 – 15 Jan 10

INTERNATIONAL AND OPERATIONAL LAW

5F-F45	9th Domestic Operational Law Course	19 – 23 Oct 09
5F-F47	52d Operational Law of War Course	27 Jul – 7 Aug 09
5F-F47	53d Operational Law of War Course	22 Feb – 5 Mar 10
5F-F47	54th Operational Law of War Course	26 Jul – 6 Aug 10
5F-F47E	2009 USAREUR Operational Law CLE	10 – 14 Aug 09
5F-F47E	2010 USAREUR Operational Law CLE	9 – 13 Aug 10
5F-F48	3d Rule of Law	16 – 20 Aug 10

3. Naval Justice School and FY 2008 Course Schedule

For information on the following courses, please contact Jerry Gallant, Registrar, Naval Justice School, 360 Elliot Street, Newport, RI 02841 at (401) 841-3807, extension 131.

Naval Justice School Newport, RI

CDP	Course Title	Dates
0257	Lawyer Course (040)	3 Aug – 2 Oct 09
0258	Senior Officer (070) (Newport) Senior Officer (080) (Newport)	24 – 28 Aug 09 (Newport) 21 – 25 Sep 09 (Newport)
2622	Senior Officer (Fleet) (100) Senior Officer (Fleet) (110)	27 – 31 Jul 09 (Pensacola) 21 – 25 Sep 09 (Pensacola)
BOLT	BOLT (040) BOLT (040)	27 – 31 Jul 09 (USMC) 27 – 31 Jul 09 (USN)
900B	Reserve Lawyer Course (020)	21 – 25 Sep 09

850T	SJA/E-Law Course (020)	20 – 31 Jul 09
4044	Joint Operational Law Training (010)	27 – 30 Jul 09
627S	Senior Enlisted Leadership Course (Fleet) (140) Senior Enlisted Leadership Course (Fleet) (150) Senior Enlisted Leadership Course (Fleet) (160)	10 – 12 Aug 09 (Millington) 9 – 11 Sep 09 (Norfolk) 14 – 16 Sep 09 (Pendleton)
748A	Law of Naval Operations (010)	14 – 18 Sep 09
748K	USMC Trial Advocacy Training (040)	14 – 18 Sep 09 (San Diego)
846L	Senior Legalman Leadership Course (010)	20 – 24 Jul 09
932V	Coast Guard Legal Technician Course (010)	3 – 14 Aug 09
4040	Paralegal Research & Writing (020)	13 – 24 Jul 09 (San Diego)
NA	Iraq Pre-Deployment Training (010) Iraq Pre-Deployment Training (020) Iraq Pre-Deployment Training (030) Iraq Pre-Deployment Training (040)	6 – 9 Oct 09 5 – 8 Jan 10 6 – 9 Apr 10 6 – 9 Jul 10
NA	Legal Specialist Course (040)	26 Jun – 21 Aug 09
NA	Speech Recognition Court Reporter (030)	25 Aug – 31 Oct 09

**Naval Justice School Detachment
Norfolk, VA**

0376	Legal Officer Course (080) Legal Officer Course (090)	13 – 31 Jul 09 17 Aug – 4 Sep 09
0379	Legal Clerk Course (060) Legal Clerk Course (070))	13 – 24 Jul 09 17 – 28 Aug 09
3760	Senior Officer Course (060) Senior Officer Course (070)	10 – 14 Aug 09 14 – 18 Sep 09

**Naval Justice School Detachment
San Diego, CA**

947H	Legal Officer Course (070) Legal Officer Course (080)	20 Jul – 7 Aug 09 17 Aug – 4 Sep 09
947J	Legal Clerk Course (070) Legal Clerk Course (080)	27 Jul – 7 Aug 09 17 Aug – 4 Sep 08
3759	Senior Officer Course (080)	14 – 18 Sep 09 (Pendleton)

4. Air Force Judge Advocate General School Fiscal Year 2008 Course Schedule

For information about attending the following courses, please contact Jim Whitaker, Air Force Judge Advocate General School, 150 Chennault Circle, Maxwell AFB, AL 36112-5712, commercial telephone (334) 953-2802, DSN 493-2802, fax (334) 953-4445.

Air Force Judge Advocate General School, Maxwell AFB, AL	
Course Title	Dates
Paralegal Apprentice Course, Class 09-05	23 Jun – 5 Aug 09
Judge Advocate Staff Officer Course, Class 09-C	13 Jul – 11 Sep 09
Paralegal Craftsman Course, Class 09-03	20 Jul – 27 Aug 09
Paralegal Apprentice Course, Class 09-06	11 Aug – 23 Sep 09
Trial & Defense Advocacy Course, Class 09-B	14 – 25 Sep 09

5. Civilian-Sponsored CLE Courses

For additional information on civilian courses in your area, please contact one of the institutions listed below:

AAJE: American Academy of Judicial Education
P.O. Box 728
University, MS 38677-0728
(662) 915-1225

ABA: American Bar Association
750 North Lake Shore Drive
Chicago, IL 60611
(312) 988-6200

AGACL: Association of Government Attorneys in Capital Litigation
Arizona Attorney General's Office
ATTN: Jan Dyer
1275 West Washington
Phoenix, AZ 85007
(602) 542-8552

ALIABA: American Law Institute-American Bar Association
Committee on Continuing Professional Education
4025 Chestnut Street
Philadelphia, PA 19104-3099
(800) CLE-NEWS or (215) 243-1600

APRI: American Prosecutors Research Institute
99 Canal Center Plaza, Suite 510
Alexandria, VA 22313
(703) 549-9222

ASLM:	American Society of Law and Medicine Boston University School of Law 765 Commonwealth Avenue Boston, MA 02215 (617) 262-4990
CCEB:	Continuing Education of the Bar University of California Extension 2300 Shattuck Avenue Berkeley, CA 94704 (510) 642-3973
CLA:	Computer Law Association, Inc. 3028 Javier Road, Suite 500E Fairfax, VA 22031 (703) 560-7747
CLESN:	CLE Satellite Network 920 Spring Street Springfield, IL 62704 (217) 525-0744 (800) 521-8662
ESI:	Educational Services Institute 5201 Leesburg Pike, Suite 600 Falls Church, VA 22041-3202 (703) 379-2900
FBA:	Federal Bar Association 1815 H Street, NW, Suite 408 Washington, DC 20006-3697 (202) 638-0252
FB:	Florida Bar 650 Apalachee Parkway Tallahassee, FL 32399-2300 (850) 561-5600
GICLE:	The Institute of Continuing Legal Education P.O. Box 1885 Athens, GA 30603 (706) 369-5664
GII:	Government Institutes, Inc. 966 Hungerford Drive, Suite 24 Rockville, MD 20850 (301) 251-9250
GWU:	Government Contracts Program The George Washington University National Law Center 2020 K Street, NW, Room 2107 Washington, DC 20052 (202) 994-5272

IICLE:	Illinois Institute for CLE 2395 W. Jefferson Street Springfield, IL 62702 (217) 787-2080
LRP:	LRP Publications 1555 King Street, Suite 200 Alexandria, VA 22314 (703) 684-0510 (800) 727-1227
LSU:	Louisiana State University Center on Continuing Professional Development Paul M. Herbert Law Center Baton Rouge, LA 70803-1000 (504) 388-5837
MLI:	Medi-Legal Institute 15301 Ventura Boulevard, Suite 300 Sherman Oaks, CA 91403 (800) 443-0100
NCDA:	National College of District Attorneys University of South Carolina 1600 Hampton Street, Suite 414 Columbia, SC 29208 (803) 705-5095
NDAA:	National District Attorneys Association National Advocacy Center 1620 Pendleton Street Columbia, SC 29201 (703) 549-9222
NITA:	National Institute for Trial Advocacy 1507 Energy Park Drive St. Paul, MN 55108 (612) 644-0323 (in MN and AK) (800) 225-6482
NJC:	National Judicial College Judicial College Building University of Nevada Reno, NV 89557
NMTLA:	New Mexico Trial Lawyers' Association P.O. Box 301 Albuquerque, NM 87103 (505) 243-6003
PBI:	Pennsylvania Bar Institute 104 South Street P.O. Box 1027 Harrisburg, PA 17108-1027 (717) 233-5774 (800) 932-4637

PLI:	Practicing Law Institute 810 Seventh Avenue New York, NY 10019 (212) 765-5700
TBA:	Tennessee Bar Association 3622 West End Avenue Nashville, TN 37205 (615) 383-7421
TLS:	Tulane Law School Tulane University CLE 8200 Hampson Avenue, Suite 300 New Orleans, LA 70118 (504) 865-5900
UMLC:	University of Miami Law Center P.O. Box 248087 Coral Gables, FL 33124 (305) 284-4762
UT:	The University of Texas School of Law Office of Continuing Legal Education 727 East 26th Street Austin, TX 78705-9968
VCLE:	University of Virginia School of Law Trial Advocacy Institute P.O. Box 4468 Charlottesville, VA 22905

6. Phase I (Non-Resident Phase), Deadline for RC-JAOAC 2010

The suspense for submission of all RC-JAOAC Phase I (Non-Resident Phase) requirements is *NLT 2400, 1 November 2009*, for those Judge Advocates who desire to attend Phase II (Resident Phase) at TJAGLCS in January 2010. This requirement includes submission of all writing exercises

This requirement is particularly critical for some officers. The 2010 JAOAC will be held in January 2010, and is a prerequisite for most Judge Advocate captains to be promoted to major, and, ultimately, to be eligible to enroll in Intermediate-Level Education (ILE).

A Judge Advocate who is required to retake any subcourse examinations or “re-do” any writing exercises must submit the examination or writing exercise to the Distributed Learning Department, TJAGLCS for grading by the same deadline (1 November 2009). If the student receives notice of the need to re-do any examination or exercise after 1 October 2009, the notice will contain a suspense date for completion of the work.

Judge Advocates who fail to submit Phase I Non-Resident courses and writing exercises by 1 November 2009 will not be cleared to attend the 2010 JAOAC resident phase.

If you have any additional questions, contact LTC Jeff Sexton, commercial telephone (434) 971-3357, or e-mail jeffrey.sexton@hqda.army.mil

7. Mandatory Continuing Legal Education

Judge Advocates must remain in good standing with the state attorney licensing authority (i.e., bar or court) in at least one state in order to remain certified to perform the duties of an Army Judge Advocate. This individual responsibility may include requirements the licensing state has regarding continuing legal education (CLE).

To assist attorneys in understanding and meeting individual state requirements regarding CLE, the Continuing Legal Education Regulators Association (formerly the Organization of Regulatory Administrators) provides an exceptional website at www.clerreg.org (formerly www.cleusa.org) that links to all state rules, regulations and requirements for Mandatory Continuing Legal Education.

The Judge Advocate General's Legal Center and School (TJAGLCS) seeks approval of all courses taught in Charlottesville, VA, from states that require prior approval as a condition of granting CLE. For states that require attendance to be reported directly by providers/sponsors, TJAGLCS will report student attendance at those courses. For states that require attorneys to self-report, TJAGLCS provides the appropriate documentation of course attendance directly to students. Attendance at courses taught by TJAGLCS faculty at locations other than Charlottesville, VA, must be self-reported by attendees to the extent and manner provided by their individual state CLE program offices.

Regardless of how course attendance is documented, it is the personal responsibility of each Judge Advocate to ensure that their attendance at TJAGLCS courses is accounted for and credited to them and that state CLE attendance and reporting requirements are being met. While TJAGLCS endeavors to assist Judge Advocates in meeting their CLE requirements, the ultimate responsibility remains with individual attorneys. This policy is consistent with state licensing authorities and CLE administrators who hold individual attorneys licensed in their jurisdiction responsible for meeting licensing requirements, including attendance at and reporting of any CLE obligation.

Please contact the TJAGLCS CLE Administrator at (434) 971-3309 if you have questions or require additional information.

Current Materials of Interest

1. The Judge Advocate General's School, U.S. Army (TJAGSA) Materials Available Through the Defense Technical Information Center (DTIC).

Each year, TJAGSA publishes deskbooks and materials to support resident course instruction. Much of this material is useful to Judge Advocates and government civilian attorneys who are unable to attend courses in their practice areas, and TJAGSA receives many requests each year for these materials. Because the distribution of these materials is not in its mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is available through the DTIC. An office may obtain this material through the installation library. Most libraries are DTIC users and would be happy to identify and order requested material. If the library is not registered with the DTIC, the requesting person's office/organization may register for the DTIC's services.

If only unclassified information is required, simply call the DTIC Registration Branch and register over the phone at (703) 767-8273, DSN 427-8273. If access to classified information is needed, then a registration form must be obtained, completed, and sent to the Defense Technical Information Center, 8725 John J. Kingman Road, Suite 0944, Fort Belvoir, Virginia 22060-6218; telephone (commercial) (703) 767-8273, (DSN) 427-8273, toll-free 1-800-225-DTIC, menu selection 2, option 1; fax (commercial) (703) 767-8228; fax (DSN) 426-8228; or e-mail to reghelp@dtic.mil.

If there is a recurring need for information on a particular subject, the requesting person may want to subscribe to the Current Awareness Bibliography (CAB) Service. The CAB is a profile-based product, which will alert the requestor, on a biweekly basis, to the documents that have been entered into the Technical Reports Database which meet his profile parameters. This bibliography is available electronically via e-mail at no cost or in hard copy at an annual cost of \$25 per profile. Contact DTIC at www.dtic.mil/dtic/current.html.

Prices for the reports fall into one of the following four categories, depending on the number of pages: \$7, \$12, \$42, and \$122. The DTIC also supplies reports in electronic formats. Prices may be subject to change at any time. Lawyers, however, who need specific documents for a case may obtain them at no cost.

For the products and services requested, one may pay either by establishing a DTIC deposit account with the National Technical Information Service (NTIS) or by using a VISA, MasterCard, or American Express credit card. Information on establishing an NTIS credit card will be included in the user packet.

There is also a DTIC Home Page at <http://www.dtic.mil> to browse through the listing of citations to unclassified/unlimited documents that have been entered into the Technical Reports Database within the last twenty-five years to get a better idea of the type of information that is available. The complete collection includes limited and classified documents as well, but those are not available on the web.

Those who wish to receive more information about the DTIC or have any questions should call the Product and Services Branch at (703)767-8267, (DSN) 427-8267, or toll-free 1-800-225-DTIC, menu selection 6, option 1; or send an e-mail to bcorders@dtic.mil.

Contract Law

AD A301096 Government Contract Law Deskbook, vol. 1, JA-501-1-95.

AD A301095 Government Contract Law Deskbook, vol. 2, JA-501-2-95.

AD A265777 Fiscal Law Course Deskbook, JA-506-93.

Legal Assistance

A384333 Servicemembers Civil Relief Act Guide, JA-260 (2006).

AD A333321 Real Property Guide—Legal Assistance, JA-261 (1997).

AD A326002 Wills Guide, JA-262 (1997).

AD A346757 Family Law Guide, JA 263 (1998).

AD A384376 Consumer Law Deskbook, JA 265 (2004).

AD A372624 Legal Assistance Worldwide Directory, JA-267 (1999).

AD A360700 Tax Information Series, JA 269 (2002).

AD A350513 Uniformed Services Employment and Reemployment Rights Act (USAERRA), JA 270, Vol. I (2006).

AD A350514 Uniformed Services Employment and Reemployment Rights Act (USAERRA), JA 270, Vol. II (2006).

AD A329216 Legal Assistance Office Administration Guide, JA 271 (1997).

AD A276984 Legal Assistance Deployment Guide, JA-272 (1994).

AD A452505 Uniformed Services Former Spouses' Protection Act, JA 274 (2005).

AD A326316 Model Income Tax Assistance Guide, JA 275 (2001).

AD A282033 Preventive Law, JA-276 (1994).

Administrative and Civil Law

AD A351829 Defensive Federal Litigation, JA-200 (2000).

AD A327379 Military Personnel Law, JA 215 (1997).

AD A255346 Financial Liability Investigations and Line of Duty Determinations, JA-231 (2005).

AD A452516 Environmental Law Deskbook, JA-234 (2006).

AD A377491 Government Information Practices, JA-235 (2000).

AD A377563 Federal Tort Claims Act, JA 241 (2000).

AD A332865 AR 15-6 Investigations, JA-281 (1998).

Labor Law

AD A360707 The Law of Federal Employment, JA-210 (2000).

AD A360707 The Law of Federal Labor-Management Relations, JA-211 (2001).

Criminal Law

AD A302672 Unauthorized Absences Programmed Text, JA-301 (2003).

AD A302674 Crimes and Defenses Deskbook, JA-337 (2005).

AD A274413 United States Attorney Prosecutions, JA-338 (1994).

International and Operational Law

AD A377522 Operational Law Handbook,
JA-422 (2005).

* Indicates new publication or revised edition.

** Indicates new publication or revised edition pending inclusion in the DTIC database.

2. The Legal Automation Army-Wide Systems XXI—JAGCNet

a. The Legal Automation Army-Wide Systems XXI (LAAWS XXI) operates a knowledge management and information service called JAGCNet primarily dedicated to servicing the Army legal community, but also provides for Department of Defense (DOD) access in some cases. Whether you have Army access or DOD-wide access, all users will be able to download TJAGSA publications that are available through the JAGCNet.

b. Access to the JAGCNet:

(1) Access to JAGCNet is restricted to registered users who have been approved by the LAAWS XXI Office and senior OTJAG staff:

(a) Active U.S. Army JAG Corps personnel;

(b) Reserve and National Guard U.S. Army JAG Corps personnel;

(c) Civilian employees (U.S. Army) JAG Corps personnel;

(d) FLEP students;

(e) Affiliated (U.S. Navy, U.S. Marine Corps, U.S. Air Force, U.S. Coast Guard) DOD personnel assigned to a branch of the JAG Corps; and, other personnel within the DOD legal community.

(2) Requests for exceptions to the access policy should be e-mailed to: LAAWSXXI@jagc-smtp.army.mil.

c. How to log on to JAGCNet:

(1) Using a Web browser (Internet Explorer 6 or higher recommended) go to the following site: <http://jagcnet.army.mil>.

(2) Follow the link that reads “Enter JAGCNet.”

(3) If you already have a JAGCNet account, and know your user name and password, select “Enter” from the next menu, then enter your “User Name” and “Password” in the appropriate fields.

(4) If you have a JAGCNet account, *but do not know your user name and/or Internet password*, contact the LAAWS XXI HelpDesk at LAAWSXXI@jagc-smtp.army.mil.

(5) If you do not have a JAGCNet account, select “Register” from the JAGCNet Intranet menu.

(6) Follow the link “Request a New Account” at the bottom of the page, and fill out the registration form completely. Allow seventy-two hours for your request to process. Once your request is processed, you will receive an e-mail telling you that your request has been approved or denied.

(7) Once granted access to JAGCNet, follow step (c), above.

3. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

The TJAGSA, U.S. Army, Charlottesville, Virginia continues to improve capabilities for faculty and staff. We have installed new computers throughout TJAGSA, all of which are compatible with Microsoft Windows XP Professional and Microsoft Office 2003 Professional.

The TJAGSA faculty and staff are available through the Internet. Addresses for TJAGSA personnel are available by e-mail at jagsch@conus.army.mil or by accessing the JAGC directory via JAGCNET. If you have any problems, please contact LTMO at (434) 971-3257. Phone numbers and e-mail addresses for TJAGSA personnel are available on TJAGSA Web page at <http://www.jagcnet.army.mil/tjagsa>. Click on “directory” for the listings.

For students who wish to access their office e-mail while attending TJAGSA classes, please ensure that your office e-mail is available via the web. Please bring the address with you when attending classes at TJAGSA. If your office does not have web accessible e-mail, forward your office e-mail to your AKO account. It is mandatory that you have an AKO account. You can sign up for an account at the Army Portal, <http://www.jagcnet.army.mil/tjagsa>. Click on “directory” for the listings.

Personnel desiring to call TJAGSA can dial via DSN 521-7115 or, provided the telephone call is for official business only, use the toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact the LTMO at (434) 971-3264 or DSN 521-3264.

4. TJAGSA Legal Technology Management Office (LTMO)

The TJAGSA, U.S. Army, Charlottesville, Virginia continues to improve capabilities for faculty and staff. We have installed new computers throughout TJAGSA, all of which are compatible with Microsoft Windows XP Professional and Microsoft Office 2003 Professional.

The TJAGSA faculty and staff are available through the Internet. Addresses for TJAGSA personnel are available by e-mail at jagsch@conus.army.mil or by accessing the JAGC directory via JAGCNET. If you have any problems, please contact LTMO at (434) 971-3257. Phone numbers and e-mail addresses for TJAGSA personnel are available on TJAGSA Web page at <http://www.jagcnet.army.mil/tjagsa>. Click on "directory" for the listings.

For students who wish to access their office e-mail while attending TJAGSA classes, please ensure that your office e-mail is available via the web. Please bring the address with you when attending classes at TJAGSA. If your office does not have web accessible e-mail, forward your office e-mail to your AKO account. It is mandatory that you have an AKO account. You can sign up for an account at the Army Portal, <http://www.jagcnet.army.mil/tjagsa>. Click on "directory" for the listings.

Personnel desiring to call TJAGSA can dial via DSN 521-7115 or, provided the telephone call is for official business only, use the toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact the LTMO at (434) 971-3264 or DSN 521-3264.

5. The Army Law Library Service

Per *Army Regulation 27-1*, paragraph 12-11, the Army Law Library Service (ALLS) must be notified before any redistribution of ALLS-purchased law library materials. Posting such a notification in the ALLS FORUM of JAGCNet satisfies this regulatory requirement as well as alerting other librarians that excess materials are available.

Point of contact is Mr. Daniel C. Lavering, The Judge Advocate General's Legal Center and School, U.S. Army, ATTN: ALCS-ADD-LB, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone DSN: 521-3306, commercial: (434) 971-3306, or e-mail at Daniel.C.Lavering@us.army.mil.